

Before the
COPYRIGHT ROYALTY BOARD
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Washington, D.C.

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In the Matter of:

The Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

(Webcasting Rate Adjustment
Proceeding)

Docket No.
2005-1 CRB DTRA

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Volume 42

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540

Tuesday,
November 21, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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I-N-D-E-X

Voir

Witness Direct Dire Cross Redirect Recross

Erik 7 12 112 285 287
Brynjolfsson

E-X-H-I-B-I-T-S

Services

Rebuttal

Exhibit No. Marked Admitted

3 E. Brynjolfsson 13
Deposition

4 Brynjolfsson 157
Deposition

5 Analysis Group 219 222
analysis of
top simulcast
streamers

1 additional features of your qualifications
2 that have arisen since the last time you
3 testified in this room?

4 **A Yes, a few minor ones. I've been**
5 **nominated and accepted to be a Research**
6 **Associate at the National Bureau of Economic**
7 **Research. I've also been asked to serve on**
8 **the Technical Advisory Group for Networks and**
9 **Information Technology of the President's**
10 **Council of Advisors on Science and Technology**
11 **and I've agreed to do that.**

12 MR. SMITH: Your Honor, I would
13 again offer Professor Brynjolfsson as an
14 expert in the pricing of digital goods.

15 CHIEF JUDGE SLEDGE: Any objection
16 to the offer?

17 MR. TAYLOR: Your Honor, I would
18 like to know whether or not that extends to
19 his qualification to speak to similarities
20 between commercial and noncommercial
21 webcasters.

22 CHIEF JUDGE SLEDGE: The testimony

1 P-R-O-C-E-E-D-I-N-G-S

2 10:05 a.m.

3 CHIEF JUDGE SLEDGE: We'll go on
4 the record.

5 MR. SMITH: Sound Exchanges calls
6 Professor Erik Brynjolfsson.
7 Whereupon,

8 ERIK BRYNJOLFSSON
9 was recalled as a witness by Counsel for Sound
10 Exchange, and having been previously duly
11 sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. SMITH:

14 Q Professor Brynjolfsson, you have
15 previously qualified as an expert in this
16 proceeding, but can you remind our judges here
17 where it is you're employed?

18 **A I'm a professor at MIT at the**
19 **Sloan School and I'm also the Director of the**
20 **Center for Digital Business, formerly the**
21 **Center for eBusiness.**

22 Q And have there been some

1 in his direct statement covers that. Yes.

2 MR. TAYLOR: Then at this point,
3 then we would object on the basis that his
4 testimony covers areas for which we don't
5 believe he is qualified to make such
6 statements.

7 CHIEF JUDGE SLEDGE: Mr. Smith.

8 MR. SMITH: Your Honor, he's
9 offered ample testimony about his expertise on
10 the pricing of digital goods distributed over
11 the internet. The question of whether the
12 corporation is doing it for profit or
13 nonprofit is something that he can certainly
14 discuss. There's no reason to think that you
15 have to have a separate proffer of expertise
16 about one or the other.

17 CHIEF JUDGE SLEDGE: Mr. Taylor.

18 MR. TAYLOR: I think if Your Honor
19 has looked carefully at his rebuttal statement
20 Section 7 the thrust of his statement is
21 primarily comparing noncommercial broadcasters
22 to commercial broadcasters and is not

1 necessarily talking about the issue of these
 2 defintial (sic) distribution of goods.
 3 Furthermore, he repeatedly indicated
 4 throughout his deposition that he has done no
 5 study concerning the noncommercial stations
 6 and therefore I see no validation on which his
 7 opinions would qualify him as an expert.
 8 MR. SMITH: Your Honor.
 9 CHIEF JUDGE SLEDGE: Yes sir.
 10 MR. SMITH: He did a study on the
 11 issue in his rebuttal testimony and that's
 12 what we're here to present and the testimony
 13 that he's given does not turn on the
 14 noncommercial nature of the stations. It has
 15 to do with the different demand curves of
 16 potential buyers and whether or not it would
 17 be economically rational for the sellers in a
 18 free market to offer a lower price for those
 19 particular buyers who can't pay the higher
 20 price and whether you would have market
 21 segmentation or whether you would have because
 22 of cannibalization you would refuse to have

1 that. It has nothing to do with the
 2 particular noncommercial nature of the buyers.
 3 It just has to do with the fact that they
 4 don't have the same resources available to
 5 them.
 6 CHIEF JUDGE SLEDGE: Anything
 7 else?
 8 MR. TAYLOR: Your Honor, I would
 9 just point out that there is nothing in the
 10 Section 7 that discusses demand curves or the
 11 likes. He does mention his theory of
 12 cannibalization but when asked about what he
 13 did to establish that, he says that he did not
 14 empirical study and it's just his personal
 15 observation from listening to NPR. I mean if
 16 Your Honors would like we may entertain some
 17 voir dire to establish whether or not he can
 18 testify to these issues that are in this
 19 testimony.
 20 CHIEF JUDGE SLEDGE: All right.
 21 Go ahead.
 22 VOIR DIRE EXAMINATION

1 BY MR. TAYLOR:
 2 Q I'm just going to ask you some
 3 questions.
 4 A Sure.
 5 Q Good morning, Dr. Brynjolfsson.
 6 A Good morning.
 7 Q How are you?
 8 A Terrific.
 9 Q Prior to this proceeding, have you
 10 ever studied noncommercial radio stations?
 11 A Not specifically, no.
 12 Q And prior to this proceeding, did
 13 you have any work that specifically related to
 14 noncommercial radio stations?
 15 A Not specifically, no. Just
 16 general principles.
 17 Q And when you did your analysis for
 18 the work in this proceeding, did you consider
 19 noncommercial stations?
 20 A Yes.
 21 Q Educational stations?
 22 A Yes.

1 Q Do you remember when we conducted
 2 a deposition about two weeks?
 3 A Yes.
 4 Q And during that deposition, you
 5 were asked about the analysis done by -- that
 6 you had done and whether or not you had
 7 considered educational stations and you said
 8 no --
 9 MR. SMITH: Do you have a line and
 10 page here?
 11 MR. TAYLOR: Yes.
 12 (Off the record discussion.)
 13 MR. TAYLOR: Your Honors, I'm
 14 handing you what we've labeled as Services
 15 Rebuttal Exhibit 3. It is the transcription
 16 from Mr. Brynjolfsson's deposition.
 17 (Whereupon, the document
 18 referred to was marked
 19 as Services Exhibit R-3
 20 for identification.)
 21 (Off the record discussion.)
 22 MR. TAYLOR: One second, Your

1 Honor, please.

2 BY MR. TAYLOR:

3 Q Dr. Brynjolfsson, if you would
4 turn to page 206.

5 A Okay.

6 Q I'm sorry. It's above that. You
7 were asked "Very quickly..." And 205 is the
8 correct page number. And it says, "Very
9 quickly on page 18 you mentioned that there
10 were most recent injury activity especially by
11 Simon Casters corroborates that the existing
12 rate is not too high. In the forming that
13 conclusion, did you consider educational
14 stations?" You said, "Not specifically, no."
15 Is that not your testimony?

16 A That is my testimony.

17 Q And so how is it then that you can
18 reconcile that you have in fact applied your
19 analysis to educational stations?

20 A Well, I spend a lot of time
21 studying digital goods and in particular, I've
22 spent a lot of time looking at the economics

1 of what we sometimes call "differential
2 pricing offering," different prices to
3 different sellers for digital goods. I teach.
4 It's one of my favorite classes I teach every
5 year for my MBA students. I've written papers
6 about this and the general principle is that
7 you want to look at whether or not there's
8 going to be cannibalization. This general
9 principle applies to all markets. What's one
10 of the nice things about economics is you can
11 apply some general rules.

12 As I state on page 199 of the
13 deposition when I asked me whether or not I
14 had specifically discussed noncommercial
15 webcasters, I say and I'll just quote there,
16 the answer, "Well, in general, I'm aware that
17 a digital copy of a good sold to one seller to
18 one buyer would be indistinguishable from a
19 digital copy sold to a different buyer and
20 thus they are potentially competitive one with
21 each other and this can adversely the seller
22 of that digital good and that applies to sound

1 recordings." In particular, I would say to
2 elaborate on that, it applies to noncommercial
3 stations --

4 Q Dr. Brynjolfsson, I'm going to
5 interrupt. My question was how do you
6 reconcile your earlier testimony before we
7 pulled out the transcript with the fact of did
8 you examine noneducational institutions and
9 you said "yes" with that which you had earlier
10 testified in your deposition which says "no."

11 MR. SMITH: Objection, Your Honor.
12 The testimony he's impeaches him with has to
13 do with whether he looked at noncommercial
14 stations in his study of entry by simulcast
15 stations. He's impeaching him with something
16 that's completely dealing with a different
17 section of his testimony. It's improper
18 impeachment.

19 CHIEF JUDGE SLEDGE: Mr. Taylor.

20 MR. TAYLOR: Your Honor, what Mr.
21 Smith characterizes as improper impeachment is
22 far from it. In fact, that is the very

1 analysis that he is being proffered for for
2 the majority of his statement. My question
3 simply goes to whether or not in making any of
4 that analysis did he in fact consider
5 noncommercial stations and as he has
6 contradicted himself here, he has not.

7 (Off the record discussion.)

8 JUDGE ROBERTS: Mr. Taylor, I am a
9 little unclear here as to what it is you're
10 alleging that he's not an expert in. I
11 understand this deposition testimony here is
12 related to Professor Brynjolfsson's statements
13 about simulcasters entering the market. But
14 when I look over at section 7 that you
15 mentioned and it seems to be specifically a
16 portion of your objection, I don't see
17 anything in section 7 about that kind of
18 testimony. I see section 7 talking about
19 treating noncommercial differently but not for
20 economic reasons. Am I incorrect in that?

21 MR. TAYLOR: No Your Honor. I
22 think you have the understanding of what my

1 objection stems from and that is simply that
 2 section 7 deals overall with his notion that
 3 noncommercial stations are or can acting like
 4 commercial stations and it is that which we
 5 are objecting to, him having any foundation or
 6 basis for offering an opinion on. He has not
 7 conducted any comprehensive study and even to
 8 address the point that he alluded to on the
 9 cannibalization I can further demonstrate that
 10 there is no support by this witness to offer
 11 any of these opinions.

12 JUDGE ROBERTS: If the standard is
 13 when you conduct a study, I think that applies
 14 to about 99 percent of the witnesses we have
 15 had in this proceeding. So it certainly seems
 16 to me it has to something more than simply
 17 that.

18 MR. TAYLOR: Well, I agree that
 19 it's a little loose, but we are formulating
 20 some standards as we have recently stopped
 21 hearing opinions from people who are not
 22 necessarily qualified to give them and I think

1 to that extent this witness is no different
 2 than those same witnesses.

3 MR. SMITH: Your Honor, there are
 4 two points in Section 7. One is that many
 5 noncommercial stations resemble commercial
 6 stations in that they have lots of money, lots
 7 of listeners and that their operations have
 8 advertising effectively. The empirical basis
 9 of that statement is stated directly in all of
 10 the exhibits he cites in the two pages of
 11 Section 7.

12 The other point is that it would
 13 be irrational to offer small noncommercial a
 14 lower rate as a matter of economics. But if
 15 you're going to do it for some non-economic
 16 reason you would want to have a safeguard
 17 which would be to have a cap of only a few
 18 listeners. That as he explained in the
 19 portion of the deposition he just read to Mr.
 20 Taylor was based on economic theory, not an
 21 empirical study. He is one of the most
 22 qualified economist in the United States to

1 testify about how economic theory would apply
 2 in this particular context, the context that
 3 has studied for his entire career.

4 Whatever Mr. Taylor has as a
 5 problem with the way he decided to apply
 6 theory is something he ought to bring up in
 7 cross examination. But we should I submit
 8 proceed to get the testimony into the record
 9 at this point.

10 CHIEF JUDGE SLEDGE: Anything
 11 further, Mr. Taylor?

12 MR. SMITH: Your Honors, I would
 13 simply state that it is true that he may be an
 14 economist that is renowned, but I don't think
 15 that that lends him credibility to opine on
 16 the similarities or differences between
 17 noncommercial and commercial broadcasters and
 18 furthermore when the record that at least I
 19 have in front of me says that he has done
 20 nothing more to educate himself about
 21 noncommercial and commercial broadcasters, I
 22 think that it would be a waste of our time to

1 listen to his opinion on that specific subject
 2 anymore than listening to the previous
 3 witnesses that we have had for which we struck
 4 their testimony.

5 CHIEF JUDGE SLEDGE: Considering
 6 the objection and the testimony on page 205 of
 7 the Exhibit 3, the Court finds that the
 8 reference on page 205 does not conflict with
 9 the offer of expertise in pricing in the
 10 internet market and the objection is
 11 overruled. The offer of expertise is
 12 admitted.

13 DIRECT EXAMINATION
 14 BY MR. SMITH:

15 Q Now you have a binder in front of
 16 you, Professor.

17 A Yes.

18 Q Grab this.

19 A Okay.

20 Q Let me ask you just to first look
 21 at the first tab in the binder which says
 22 "Rebuttal Testimony." Is this your written

1 rebuttal testimony?

2 A Yes, it is.

3 MR. SMITH: Your Honor, I would
4 ask that his written testimony be admitted.

5 CHIEF JUDGE SLEDGE: Mr. Joseph.

6 MR. JOSEPH: Your Honor, at this
7 point there would be a technical objection to
8 this. I would object on the grounds that this
9 is redundant (Inaudible.) procedure which is
10 specified that that which are part of the
11 written direct statements are presumed
12 admitted unless an objection is made and a
13 motion is filed to strike them.

14 CHIEF JUDGE SLEDGE: Objection
15 sustained. The offer is inconsistent with the
16 regulation.

17 MR. SMITH: Your Honor, if I
18 might. The new regulations say written
19 testimony in exhibits must be authenticated or
20 identified in order to admissible as evidence.
21 That was why I thought we were operating under
22 the new rule in the second phase of the trial.

1 We weren't having them identified in the first
2 phase either. That's why. The ruling stands
3 however I gather. Thank you.

4 Can I inquire whether that ruling
5 extends to the exhibits that are incorporated
6 in the direct testimony, Your Honor, within
7 the rebuttal testimony?

8 CHIEF JUDGE SLEDGE: Yes, it does.

9 MR. SMITH: It does. Okay, thank
10 you. That will save us some time.

11 DIRECT TESTIMONY (Cont'd)

12 BY MR. SMITH:

13 Q Now I want to start your testimony
14 today, Professor, by referring to Section 6 of
15 your rebuttal testimony where you talk about
16 the willing buyer and willing seller standard
17 and your response to Dr. Jaffe's conception of
18 how the hypothetical marketplace should be
19 perceived. Do you recall that?

20 A Yes I do.

21 Q Okay. Now first of all, how is
22 that you think that the hypothetical

1 marketplace of willing buyer/will seller
2 thought to be conceived of?

3 A It's very straightforward. It's
4 essentially the marketplace that we have now
5 except without the transition costs and
6 without the mechanism such as Sound Exchange
7 and CRB that have been created to help
8 eliminate or mitigate those transaction costs.
9 So it's the existing buyers and sellers,
10 namely the record companies and the webcasters
11 and they would be selling a blanket license.

12 Q Now why is it you think that's the
13 right way to think about it?

14 A Well, it's just the most natural
15 interpretation. We have a marketplace here.
16 We have some willing buyers. We have some
17 willing -- We have some buyers and sellers.
18 We should match them up with how they would
19 behave if they were willing, if they weren't
20 constrained by any compulsion and for what
21 it's worth, it's what-- Other people have come
22 to that same conclusion. For instances, the

1 CARP in their report to the Library of
2 Congress said that the panel perceives the
3 Section 114(f)(2) Hypothetical Marketplace is
4 one where the buyers are DMCA eligible, also
5 referred to as DMCA compliant services, the
6 sellers or record companies, and the product
7 being sold consistent with blanket license for
8 each record company's repertoire of sound
9 recordings.

10 Q Now referring to this hypothetical
11 market where the existing record companies are
12 selling to the existing webcasters, is that a
13 market in which there would be competition
14 among the sellers, among the record companies
15 and their sales to the webcasters?

16 A Well, certainly there would be a
17 degree of competition.

18 Q Now I take it then competition is
19 a matter of degree?

20 A Yes, I think this is an important
21 factor to bring up. In reading Dr. Jaffe's
22 testimony, it appeared that he was setting up

1 sort of a dichotomy between monopoly on one
2 side and perfect competition where there was
3 no market power, no bargaining power. Real
4 marketplaces in general are going to have some
5 varying degrees of competition where the
6 participants, the sellers in particular, do
7 have some bargaining power and that certainly
8 would apply in this case where I believe the
9 sellers compete but they also have some
10 bargaining power.

11 CHIEF JUDGE SLEDGE: Mr. Joseph.

12 MR. JOSEPH: Your Honor, I would
13 object and move to strike on page 39. Dr.
14 Brynjolfsson does talk about Dr. Jaffe's false
15 dichotomy but nowhere in this testimony does
16 he offer an opinion on whether or not there is
17 competition in the marketplace for -- whether
18 there would be competition in the hypothetical
19 market that he's just described.

20 CHIEF JUDGE SLEDGE: I thought I
21 remembered that.

22 MR. SMITH: Your Honor, that's

1 exactly what he says in that paragraph on page
2 39 in saying that they don't have monopoly
3 power. It's 75/25 division in saying that
4 there's a false dichotomy between monopoly and
5 perfect competition. It's the main theme of
6 his discussion that there's some competition,
7 not perfect competition and to suggest that he
8 hasn't disclosed it, this is the topic of his
9 testimony, I think is false.

10 CHIEF JUDGE SLEDGE: The objection
11 is overruled.

12 DIRECT TESTIMONY (Cont'd)

13 BY MR. SMITH:

14 Q Now in suggesting that there's
15 some degree of competition, did you come up
16 with a quantitative estimate?

17 A Yes I did.

18 Q And what was that? A bargaining
19 power essentially?

20 A Yes, it's my best estimate that
21 the record companies would have more
22 bargaining power than the webcaster and would

1 get more than half of the surplus. In
2 particular, I estimate they would get about 75
3 percent of the resulting surplus and the
4 webcasters would get about 25 percent of the
5 resulting surplus.

6 Q Now in offering that opinion, what
7 assumption are you making about the extent to
8 which the webcasters would have to buy the
9 rights of all four major record companies'
10 recordings?

11 A I think it would be very
12 advantageous for them to get the blanket
13 licenses to all four major companies and for
14 that matter for sound recordings as they were
15 able to acquire. It's possible that they
16 could remain in business perhaps without those
17 but these blanket licenses would be required
18 valuable.

19 Q Given that reality and given the
20 existence of the copyrights, how is that there
21 would still be a measure of competition among
22 the sellers in this marketplace?

1 A Well, they could continue to
2 compete on at least two dimensions. First
3 off, it is possible though it might not be the
4 best business strategy to run a webcasting
5 service, I believe, without all four of,
6 without licensees from all four of the record
7 companies. But even if you did have licenses
8 from all four, there would be a great deal of
9 competition for market share. Webcasters have
10 a lot of discretion over how much air play
11 they give to different songs and I would
12 expect that the owners of the sound recordings
13 would want to get greater market share so that
14 they would compete in order to gain market
15 share from the webcasters.

16 Q Now how would that 75 percent
17 bargaining power that you estimate for the
18 record companies compare to the bargaining
19 power of monopolies?

20 A Much of the bargaining power just
21 comes in the fact that they have a unique
22 asset, copyrighted asset, but part of it also

1 comes also from the market structure. If
2 there were only one single monopolist, then
3 those two types of competition that I just
4 described wouldn't exist. I mean certainly
5 not to the same extent and as a result a
6 monopolist would have a great deal more
7 bargaining power and would probably be able to
8 capture closer to 100 percent, probably not
9 entirely 100 percent but closer to 100 percent
10 of the surplus.

11 The reason it might not be 100
12 percent is that on the other side the buyer,
13 especially the large buyers like Yahoo, have
14 some monopsony power. So they have some
15 bargaining power as well.

16 Q Now is that 75/25 figure a precise
17 analysis?

18 A Well, no. You can't pin it down
19 precisely to the exact decimal point and I
20 don't claim to have done that, but I feel
21 fairly confident in the range. Clearly, it's
22 greater than 50 percent, probably greater than

1 60 percent or 70 percent because looking at
2 this market it's obvious that the owners of
3 the sound recordings, the record companies,
4 have a great deal more bargaining power than
5 the webcasters. On the other hand, it's not
6 for the reason I've just mentioned 100
7 percent. So I feel comfortable that it's
8 probably somewhere between 70 and 80 percent
9 or maybe 65 and 85 percent, in that general
10 range.

11 Q And how significant in terms of
12 your overall analysis is the variation within
13 that range?

14 A It's very straightforward. I
15 intentionally constructed my model so that you
16 could at the end basically plug in whatever
17 kind of bargaining power you think is
18 appropriate. If you don't think 75 percent is
19 correct, you could plug in 65 percent or 85
20 percent. It translates directly into a
21 recommendation for the royalty in particular.
22 If you moved it by 10 or 20 percent, then the

1 ultimate royalty would be adjusted by 10 or 20
2 percent. It wouldn't dramatically affect the
3 recommendation, but it would affect it plus or
4 minus by the percentage that you wanted to
5 adjust the bargaining power.

6 Q Now Dr. Jaffe offered testimony in
7 the first phase of this case that method like
8 yours, trying to estimate the price by looking
9 at the costs and revenues in the webcasting
10 industry wouldn't work in this context. Do
11 you have a response to that testimony?

12 A Well, I disagree not surprisingly.
13 I found it to be a very straightforward
14 application of a fairly standard methodology,
15 a way of thinking about things. You look at
16 the relevant revenues and costs and compare
17 those and then you look at the bargaining
18 power. It would apply in this setting just as
19 it would in anything.

20 Q Well how does the fact that one of
21 the costs of the webcasters is a musical
22 works' royalty in addition to the sound

1 recording royalty, how does the effect the
2 validity or viability of your ground-up
3 approach to estimating the price?

4 A It strikes me as a red herring. I
5 mean there are lots of essential inputs. I
6 mean, bandwidth is an essential input and we
7 don't see to have a problem with including
8 that and estimating that. Musical works are
9 an essential input and we include those in
10 there. They are set exogenously, separately,
11 from this proceeding just as bandwidth is set
12 separately. So it makes it very
13 straightforward for us to just incorporate it
14 into our model. I don't see anything special
15 in that regard.

16 Q Do you see the musical works
17 rights and the sound recording rights as being
18 intertwined in some way?

19 A Well, intertwined is not an
20 economic term. I don't -- So in terms of
21 trying to understand what Dr. Jaffe means when
22 he uses that word, I mean, it could mean that

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1 it's essential, but we've already just
2 discussed the essential goods, there's no
3 particular difficulty with essential goods,
4 bandwidth or any of the other ones. It could
5 mean that he thinks that they are set in
6 conjunction with the sound recording
7 royalties, that we need to set those prices
8 simultaneously.

9 Well, just as a matter of fact,
10 that's not the case. We set them separately
11 and my understanding is in fact that Congress
12 specifically directed that the prices we set
13 here should not be used to effect the musical
14 work rates, that they should be thought of as
15 separately. But hypothetically if you wanted
16 to set them jointly, again there would be no
17 particular problem in doing that. People do
18 that all the time. It would just be a three-
19 way bargaining instead of a two-way
20 bargaining.

21 Q And how would you analyze the
22 bargaining in that three-way situation? Say

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1 you tried to apply your model but not treat
2 the musical works royalty as a cost but as an
3 additional royalty to be estimated.

4 A We'd have to do that, of course,
5 because they were set, but if you wanted to
6 you could have a proceeding where you set both
7 rates simultaneously. You could do that.
8 There would be no particular difficulty in
9 doing that. You would just do the exact same
10 thing. You look at the relevant revenues and
11 costs and you have some amount of surplus.
12 Now you would divide it up among three parties
13 instead of two parties and you would look at
14 the relative bargaining power of those.

15 It wouldn't certainly necessarily
16 mean that they each got a third or any set of
17 preset amount. When I sold my house, I got
18 some of the surplus. The buyer got some of
19 the surplus and the real estate agent got some
20 of the surplus. We didn't divide it evenly
21 but it was a function of market structure,
22 costs, bargaining power.

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1 Q Which costs would affect the way
2 that that's divided?

3 A Well, all the relevant costs and
4 all the relevant market structure and the
5 existence of substitutes. In particular, you
6 know, the fact that the costs of sound
7 recordings are so much greater than the costs
8 of musical works would certainly enter into
9 that tradeoff.

10 Q Now are there any particular
11 pitfalls with your approach of estimating a
12 price in a hypothetical by kind of going
13 round-up with costs and revenues?

14 A Yes, certainly. I mean the
15 difficulty -- I think conceptually it's very
16 straightforward. I mean the difficulty, of
17 course, is in pinning down the precise
18 numbers. So as any exercise, you need to get
19 the data and you need to know what the costs
20 are and what the revenues are and so forth.
21 So getting those with a degree of precision
22 will influence how precise you can be about

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1 the final estimate.

2 Q Can you give us a sense of how the
3 data that you had here compares with the kind
4 of data that you rely on and your colleagues
5 rely on in academic studies that are somewhat
6 comparable?

7 A Sure. It's very similar. It's
8 very similar in terms of you get data from a
9 variety of sources. One of the things we try
10 to do is corroborated data from multiple
11 different perspectives, triangulated if you
12 will, on the values so that you don't want to
13 put too much weight on any one particular CPM
14 or cost of bandwidth. You get from a number
15 of different sources and you see what pattern
16 emerges in the data and check and double-check
17 that.

18 In this case, we had a very
19 consistent story. I could trace through a
20 little bit of that.

21 Q Yes. Why don't you just tell us
22 how you went about that?

1 A I mean, the first thing we did was
2 we got data from publicly available sources.
3 We got data from analysts' reports, from the
4 webcasters' own websites, from published
5 reports on bandwidth costs and so forth and
6 from that we were able to construct a model.
7 I constructed a model, Model 1, Model 2, that
8 showed how those costs had changed over time
9 and we also saw that bandwidth had fallen a
10 lot, that revenues had raised, grown a lot,
11 since the CARP.

12 In Model 2, we looked at just the
13 ground-up basic numbers and that gave us an
14 estimate of what the surplus was. The nice
15 thing was that in this case we were also able
16 to do discovery and find out, fill in, some of
17 those gaps and corroborate some of those
18 numbers with data from the webcasters
19 themselves and we found that by and large the
20 factual numbers that they reported to us were
21 consistent with the numbers that we had gotten
22 from public sources.

1 On average, the costs actually
2 were falling somewhat faster than we had
3 projected. The revenues had grown somewhat
4 faster than we had projected. The total
5 surplus was somewhat greater than we had
6 projected. The revenue per hour was somewhat
7 higher than we had projected for major
8 webcasters. But it told a broadly consistent
9 story so we were able to corroborate that.

10 And then just recently, you know,
11 we've had a third source of corroboration
12 which is you look at the actual behavior of
13 the webcaster, in particular the simulcasters
14 and you see that they're entering the market
15 in droves despite what they were saying about
16 not entering. We'll probably get a chance to
17 talk about this later, but they apparently see
18 this as a profitable opportunity for them to
19 move into. So I would say their actions speak
20 louder. In this case, they are choosing to do
21 this and you have to presume that's because as
22 the economic analysis indicated, this is

1 profitable industry and one with very
2 promising prospects.

3 Q How does the quality of the data
4 you had available to you compare ultimately to
5 the kind of data that actual buyers and
6 sellers and have available to them in real
7 market transactions?

8 A Well, I think this is actually one
9 of the benefits of this proceeding is that
10 real buyers and sellers in a marketplace would
11 have access to their own costs and revenues,
12 but they would only have to make inferences
13 about the other side. In this case because of
14 discovery, we actually have the data and so we
15 are able to actually ironically be in a better
16 position than a free market in terms of
17 determining what the relevant price is and
18 costs would be and pin it down with greater
19 certainty I believe.

20 Q And now let's turn to a different
21 topic, Professor, and that is --

22 A Let me just say. I'm not claiming

1 that it's complete certainty, but in any real
2 market, of course, there's going to be a range
3 of different costs and prices. But in this
4 case, I would say it's my opinion that we have
5 better data than they would if they were doing
6 it on their own.

7 Q The next topic would be Dr.
8 Jaffe's alternative approach to estimating the
9 price which is the musical works rate is a
10 benchmark. Let me ask you first. Do you have
11 a problem with benchmarks as a way to estimate
12 a price in this kind of exercise?

13 A No, I think benchmarks are
14 wonderful. I'm all for benchmarks. It's part
15 of my general philosophy if you want to
16 triangulate on a value from a number of
17 different perspectives and obviously the
18 better the benchmark, the more weight you can
19 put on it.

20 Q Okay. What's your opinion about
21 the validity of Dr. Jaffe's preferred
22 benchmark, the musical works rate for

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1 webcasting?

2 **A I don't think we can put any**
3 **weight at all on that one because I don't**
4 **think it's a good benchmark.**

5 **Q Okay. Can you give us the reasons**
6 **why generally you think it's an inappropriate**
7 **benchmark?**

8 **A Sure. It's an inappropriate**
9 **benchmark because it's a different product in**
10 **a different setting with a different market**
11 **structure and a different cost structure and**
12 **as a consequence unlike, say interactive**
13 **sounding recording, it is a real stretch to**
14 **try to apply it in this setting.**

15 **Q So how does the fact that they are**
16 **both rights that you need to have as a**
17 **webcaster factor into your decision about**
18 **whether that's an appropriate benchmark?**

19 **A Yes, I think that strikes me as a**
20 **bit of red herring. There are lots of things**
21 **that are essential. I mean to make an**
22 **analogy, I mentioned in the report, coffee**

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1 **beans and water are both essential to a good**
2 **cup of coffee, but I don't think anyone would**
3 **argue that they have to have the same price.**
4 **The fact that they're essential doesn't really**
5 **make any difference.**

6 **Q How about Dr. Jaffe's point that**
7 **not only are they essential but the costs**
8 **ought to be disregarded by the sellers in this**
9 **situation?**

10 **A That's an interesting point. It's**
11 **not factually accurate that the costs are the**
12 **same.**

13 **Q What do you understand his opinion**
14 **to be and then what's your response to it?**
15 **Maybe that's the best way to handle this.**

16 **A My understanding is that he**
17 **believes that all of the costs of sound**
18 **recordings are sunk and my response to it is**
19 **that that's just as a matter, an easily**
20 **verified fact not true.**

21 **(Off the record comment.)**

22 **BY MR. SMITH:**

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1 **Q I've put on the easel, Professor,**
2 **the Figure 1 from page seven of your written**
3 **rebuttal testimony just in case you want to**
4 **refer to it. It's obviously in the written**
5 **testimony as well. Can you tell us what this**
6 **figure is meant to convey?**

7 **A Sure. May I stand up and just**
8 **point out these things here? Would that be**
9 **all right?**

10 **CHIEF JUDGE SLEDGE: As long as**
11 **you stay close to that microphone.**

12 **THE WITNESS: All right. Okay.**
13 **Don't move it?**

14 **CHIEF JUDGE SLEDGE: We'll let you**
15 **know if there's a problem.**

16 **THE WITNESS: Okay. So what we**
17 **have here is some evidence in terms on this**
18 **question of whether or not the costs are sunk.**
19 **What this pie chart on the left here shows is**
20 **the share of sales from new releases/current**
21 **releases versus catalog sales. Current**
22 **releases are defined as releases within the**

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1 **past two years, past 24 months and this is**
2 **from Nielsen data. And as you can see, over**
3 **half of sales come from what they call**
4 **"current releases," these new releases.**

5 **This was for the year 2003, the**
6 **most recent data that we have, complete data**
7 **that I was able to have available. However,**
8 **my understanding is that it's very consistent**
9 **in previous years and I would expect that**
10 **moving forward for the period of this license**
11 **we could expect a broadly similar ratio or**
12 **actually for the purposes of this all we need**
13 **to know is that this share of new releases is**
14 **not zero.**

15 **BY MR. SMITH:**

16 **Q What does that tell us about these**
17 **as to which the cost associated with songs**
18 **that would be webcast in the next five years**
19 **have already been expended?**

20 **A It's not true. I mean, it almost**
21 **seems as though Dr. Jaffe imagined that these**
22 **record companies have this big library of**

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1 sound recording and they sit back and kind of
2 just digitally copy them and sell them, but
3 that's not how the industry works at all. As
4 a number of people have testified, they spend
5 a great deal of time and effort. Really their
6 whole business is in identifying these new
7 artists and producing these new recordings and
8 that's what they're going to be doing for the
9 next five years as well. Those are not some
10 costs. Those are costs that they will be
11 incurring in the future.

12 Q Can you tell us just to finalize
13 here what the second, the right-hand of the
14 Figure 1 tells us?

15 A It's just another way of
16 presenting essentially the same broad story.
17 Another way you could look at it, you could
18 look at the top 200 albums and here we have
19 some more recent data for 2005. So we looked
20 at Billboard's top 200 albums just to look at
21 them and then we went one by one and looked at
22 what was the release date of each one of those

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1 albums and we looked at them all and you can
2 see well over 90 percent of them were released
3 in either 2004 or 2005. A small fraction were
4 released in 2003 and only one out of 200 was
5 actually released before 2003.

6 So it underscores how important
7 what the record labels do, how important
8 finding new music is and creating new music is
9 really the essence of it. It's something that
10 I would expect and hope, I think we would all
11 hope, that they would continue to do that for
12 the next five years as well. So as to whether
13 or not the costs are sunk, you could argue
14 they are for this fraction and maybe that
15 fraction over there, but by and large, they're
16 not sunk.

17 Q Now did the CARP in its prior
18 setting of rates for webcasting comment on
19 this sunk cost issue?

20 A Yes, as a matter of fact I recall
21 they did. Let me just see. I think, yes. If
22 you look at page eight of my testimony, they

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1 came to the same conclusion that I did. I
2 think that anybody who gives a fair assessment
3 of this would come to the same conclusion.
4 Specifically they said "The panel rejects Dr.
5 Jaffe's premise" and I'm reading here Footnote
6 18. "That the value of performance right and
7 sound recordings are necessarily not great
8 than musical works because the costs are
9 'sunk.' This view assumes erroneously in our
10 view that sound recording owners have static
11 perspective and do not consider the cost of
12 developing new sound recordings when
13 negotiating fees."

14 Q Now even assuming that the costs
15 are not all sunk, would it be reasonable to
16 argue that sellers, the record companies,
17 wouldn't attempt to recover their costs
18 through the webcasting rates because that
19 market is such a small percentage of their
20 overall channels of distribution?

21 A That's a novel argument and I just
22 don't see any basis in the way that real

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1 buyers and sellers behave.

2 Q Can you tell us how it is that you
3 think small markets are treated by real
4 sellers then?

5 A Well, pretty much the same way as
6 large markets. I mean when a dollar comes in
7 it's not labeled this dollar came from small
8 market, this dollar came from a big market.
9 They're all indistinguishable. They're
10 fungible and you use that money to cover your
11 costs and you look to cover it from whatever
12 market you can. I mean even just the
13 definition of markets for these purposes you
14 could slice it lots of different ways. You
15 could look at the market in Ghana would be a
16 very small market and the market in California
17 might be -- I mean you could slice it all
18 these different ways. In the end, it's all
19 going to add up to 100 percent and there's no
20 particular reason that you would ignore, if
21 you slice it a certain way, the dollars that
22 come from one market or one piece of a market

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1 and only look to some other pieces. I mean in
2 the end each of these different pieces is
3 going to add up to the total and to take one
4 of them or some subset of them and say we're
5 going to treat them differently than the other
6 little pieces there's no economic basis for
7 that and there's no business basis for that.

8 Q But what does recent history tell
9 us about the extent to which these market
10 segments have stayed static in the sense that
11 there's always one or two that are big and
12 others that are small?

13 A So that's another problem with the
14 argument is this presumption that webcasting
15 is always going to be a relatively small
16 share. We know for a fact that's not the
17 case. The webcasting is growing. Meanwhile,
18 other markets are shrinking. I remember Mr.
19 Roback's testimony that he predicted or was
20 working towards the demise of CD sales and
21 record stores. I think that's great. We will
22 eventually have the elimination of some of

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1 these markets and other markets will grow to
2 replace them.

3 We've already seen that happen in
4 things like ring tones or digital downloads,
5 markets that didn't even exist awhile ago. I
6 suppose that if you were to have looked at
7 them in 2003 or whatever you would have said
8 that's a small market. But increasingly, the
9 record companies are looking or depending on
10 these markets including webcasting to pay
11 these very large costs that they're going to
12 be incurring.

13 Q Now a slightly different topic.
14 How does the process that is used to set the
15 rates for the musical work rights affect your
16 assessment of that, particularly your
17 benchmark?

18 A Well, for all the reasons I
19 discussed, I wouldn't want to use musical
20 works as a benchmark. But if you did use it
21 as a benchmark, you'd want to be able to have
22 some reliable number that you could refer to

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1 and if you look at the way that rates are set
2 for musical works, it doesn't seem like a very
3 good market for one to rely on, at least for
4 our purposes.

5 Q Why is that?

6 A We want to -- We're charged with
7 finding out what willing buyers and willing
8 sellers would agree to pay for blanket
9 licenses. Over in the musical works rate
10 setting process, there is a consent decree and
11 there's a different market structure and as a
12 consequence, you have decisions being made in
13 the shadow of that rate court and consent
14 decree that I don't think can be fairly be
15 described as a free market of willing buyers
16 and sellers. In particular, it strikes me
17 that it's likely that the rates are lower than
18 they probably would be otherwise.

19 Q Are you referring there to BMI and
20 ASCAP?

21 A Yes, good point. Specifically
22 that is what is set for BMI and ASCAP and just

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1 to elaborate there is actually one of the
2 PROs, Performing Rights Organizations, that
3 isn't apparently subject to the consent decree
4 and my understanding is that they have
5 negotiated the rates. If you look at them, I
6 think I calculated the CS. On page 12 of my
7 testimony, SESAC when they voluntarily the
8 rates or offer rates to the webcasters, their
9 standard agreement works out to be about 1.75
10 cents per aggregate tuning hour which is far
11 more than what Dr. Jaffe has proposed. So my
12 point isn't that I think that's the right rate
13 either. It's subject to all the problems that
14 I just discussed. However, it's clear that
15 the rates for musical works vary a great deal
16 and will depend on whether or not there's a
17 consent decree or not a consent decree and in
18 this case come up with an answer that's
19 completely different from what Dr. Jaffe
20 suggested it would be.

21 Q So I wonder if you could comment
22 on Dr. Jaffe's testimony that's a form of

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1 empirical support for his use of the musical
2 works rates and the market for synch rights
3 and master use licenses.

4 A I do a lot of empirical work and
5 I'm delighted that he sought empirical
6 validation for his hypothesis. Unfortunately,
7 the synch rights market, the master use synch
8 rights market, is really not going to tell us
9 anything meaningful about whether or not there
10 is -- what the ratio might be or should be or
11 if there's a ratio between the prices for
12 sound recordings and musical works.

13 Q What are the problems with that
14 particular purported form of empirical support
15 for the equalization of the royalty rates for
16 musical works and sound recordings?

17 A It was disappointing. You had to
18 go so far afield to try and find an example.
19 This particular one has at least four, I
20 think, fatal flaws. First off, the products
21 are not the same and I'm not talking about
22 musical works and sound recordings, but I'm

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1 talking about the fact that in the synch
2 rights market you're buying and selling
3 individual sound recordings, individual songs,
4 whereas what we are doing in this proceeding
5 is looking at blanket licenses.

6 I think Dr. Jaffe would agree or
7 has agreed that the bargaining power, the
8 outcomes, are likely to be very different when
9 we look for blanket licenses versus individual
10 songs. In particular, with individual songs,
11 you have much more, the buyer has much more,
12 discretion, bargaining power, to switch from
13 one to the other. So that's going to give you
14 a different outcome and I think we all can
15 recognize that.

16 Q Okay. That's one problem.

17 A No. 2, movies, people go to movies
18 generally to see the movie, to see the actors,
19 the plot and so forth. Not many people will
20 go to a movie because there's a song playing
21 in the background in that particular movie.
22 In contrast, when people listen to music, it's

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1 fair to say they're doing it in order to
2 listen to the music. So the value and the
3 purpose of the music is very different in
4 those two settings. Why does that make a
5 difference? Well, because it gives the buyer
6 in the synchronized market a lot more freedom
7 to make substitutions.

8 If there's music playing in the
9 background and they substitute a cover band as
10 opposed to the original artist for that song,
11 most people might not even notice or really
12 care. But when you're buying or listening to
13 music or subscribing to music, you're doing it
14 for the music. You do want to hear the
15 original artist. For movies, they will on
16 occasion substitute a cover band replacing the
17 -- and therefore not even have to pay
18 royalties and even when don't explicitly do
19 it, there's always a threat that they can do
20 that and that means that the owners of the
21 sound recordings are going to be in a much
22 weaker bargaining position for that kind of a

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1 product.

2 Q Would you expect that in this
3 negotiation the relative values of sound
4 recordings versus music works are going to
5 always have the same ratio to each other?

6 A Well, this was an interesting
7 point. Dr. Jaffe puts this theory forward
8 that they should always have the same value
9 and then he goes on to give examples where
10 they don't have the same value. He says that
11 "If you're making a movie," and this is on
12 page 14 I quote him, "If you're making a movie
13 about a birthday party, it's really important
14 to use 'Happy Birthday,'" the song, "Happy
15 Birthday." So that would be a case where I
16 would put a higher value on the musical work
17 than the sound recording.

18 He also gives examples where you
19 put higher value on the sound recording than
20 the musical work. So apparently he doesn't
21 think that people would always put the same
22 value on these inputs. It all depends on what

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1 their motivation, what their goal is. So he
2 doesn't seem to agree with his own theory in
3 that example.

4 Q What about his statement that they
5 probably average out?

6 A Well, that's not the way averages
7 work, at least, in this setting. I mean you
8 could have 100 movies like that "Happy
9 Birthday" one. Maybe there's one where "Pomp
10 and Circumstance" or "Hail To The Chief" or
11 you can have lots of other songs that you
12 needed to have and in all of those cases you
13 would want to put more weight on the musical
14 works and it doesn't matter whether you had
15 one or 50 or 100. They would still average
16 out that the musical works would have
17 relatively more value than the sound
18 recordings.

19 Now there may be other cases,
20 other motivations, where it's the other way.
21 They could average out to any particular value
22 depending on what the ratio of values, of

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1 motivations is. It really have nothing to do
2 with his theory about essential goods and all
3 that stuff. It just has to do with what the
4 marketplace, what your motivations are, how
5 many movies you make of this type versus the
6 other type. So the fact that you can find
7 some markets somewhere where these ratios are
8 sort of similar is kind of like saying there's
9 this marketplace in Casablanca where coffee
10 beans and water have the same price.
11 Therefore, they must always everywhere have
12 the same price.

13 Q Now how does the factor of
14 promotion versus substitution factor into
15 determining whether or not the synch rights
16 analogy is an apt one?

17 A Well, this is yet another
18 difference between the synch rights market
19 versus the webcasting market. Well recognized
20 that promotion is potentially important and
21 for that matter, substitution is potentially
22 important. When you listen to music in a

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1 webcast, it's quite likely that that will to
2 some extent substitute for listening to it
3 through some other medium, through a digital
4 download or CD or whatever. So there is some
5 substitution effect. There also may well be
6 some promotion effects and the record
7 companies are going to trade off the
8 substitution and the promotion.

9 Now in the synch rights market,
10 you still, I think, potentially could have
11 that promotional effect. You probably would.
12 If Madonna's song is featured, that may lead
13 to more sales of her CDs. It's much less
14 likely that if there's any substitution
15 effect. I don't know if people who say I'm
16 going to go to this movie instead of buying
17 the CD. There's not much substitution if any
18 that occurs there.

19 In practical terms, what does that
20 mean? It means that the record companies, the
21 owners of the sound recording, are going to
22 see that promotional value from the movies and

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1 potentially compete to have their songs
2 featured and discount their prices for that.
3 Whereas, in the webcasting market, whatever
4 promotion value there is they also have to
5 factor in the substitution. So it's going to
6 be a different calculus, one that would likely
7 lead to a higher price in the webcasting
8 market.

9 Q So could you, if you could at this
10 point, just summarize your opinion about
11 whether or not it would be appropriate in
12 setting the sound recording rate for
13 webcasting just to model it on the rate that
14 exists for musical works?

15 A I don't think that there's any
16 value at all in that particular approach. I
17 mean the theoretical basis for it doesn't
18 exist. There's no theoretical reason to
19 expect these prices to be the same.
20 Empirically, there is not evidence that
21 they're going to be the same. So it doesn't
22 strike me as a sound basis.

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1 Q Now next topic in your rebuttal
2 testimony, Professor, is --

3 MR. SMITH: Your Honor, I don't
4 know if we're going to take an 11:00 a.m. or
5 not considering when we started. I am going
6 to another topic, so I give you the option at
7 this point.

8 CHIEF JUDGE SLEDGE: Well,
9 everyone in the room here has been here since,
10 waiting, since 9:30 a.m. So perhaps it would
11 be kind not to keep them here. We'll recess
12 ten minutes. Thank you. Off the record.

13 (Whereupon, at 11:02 a.m., the
14 above-entitled matter recessed and reconvened
15 at 10:15 a.m. the same day.)

16 CHIEF JUDGE SLEDGE: On the
17 record. Thank you. We'll come to order.

18 MR. SMITH: Thank you, Your Honor.

19 DIRECT EXAMINATION (Cont'd)

20 BY MR. SMITH:

21 Q Turning to Section 3 of your
22 testimony, Professor, which is the network

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1 effects section starting on page 16, could you
2 just quickly tell us what network effects
3 means in this context.

4 A Yes, in this context, there may be
5 spillovers or network effects which lead to
6 revenues being produced on one part of a site,
7 like a portal, that are increased due to
8 activity on another part of the site.

9 Q And is that a significant part of
10 the value that webcasters receive when they
11 operate a portal?

12 A Well, I was going to say for some
13 webcasters it is. For organizations like
14 Yahoo, I think that's really the essence of
15 their business strategy is to create a
16 destination site with lots of different
17 properties and a single unified brand and so
18 you get spillovers from one part of the site
19 to the other part of the site.

20 Q Did you report in your testimony a
21 value that Yahoo has for each of the users
22 that comes to the site?

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1 A Yes, according to this Analyst Day
2 Presentation, I guess it's labeled Exhibit 207
3 RP, they estimated that each additional user
4 would generate about 79 cents of value per
5 month.

6 Q To Yahoo?

7 A To Yahoo.

8 Q Okay. Now so is this value of
9 spillovers to other pages on the site
10 something that the willing buyer/willing
11 seller would consider in negotiating the
12 market price?

13 A It certainly is just as any other
14 source of value would be.

15 Q Did you factor it in as a
16 quantitative matter to your recommended rate
17 in your analysis?

18 A Actually no, I didn't. It's one
19 that's more difficult to pin down with a great
20 deal of precision. So I only included the
21 direct benefits. I understood that these
22 spillover benefits existed and are likely to

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1 be quite substantial. But the rate I
2 recommended did not include any consideration
3 for the spillovers.

4 Q Okay. So how should that factor
5 into the decision that the judges have to make
6 here?

7 A Well, certainly I think it should
8 be a consideration and it would suggest that
9 the actual rate that a willing buyer and
10 willing seller would agree to for a blanket
11 license would be higher than the direct value
12 that I recommended in my testimony. As to how
13 much higher, I didn't make a quantitative
14 analysis.

15 Q So does this additional benefit --

16 JUDGE WISNIEWSKI: Can I ask a
17 question here? While I appreciate that you
18 may consider this a factor, I'm troubled by
19 testimony that encourages us to look at a
20 potential impact on a rate that will be a
21 specific quantitative rate without giving us
22 any magnitude to adjust that rate to account

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1 for that effect. If you were in our position,
2 how would you do that?

3 THE WITNESS: Well, so let me just
4 -- I haven't done the quantitative analysis.
5 So with that caveat, if you look at portals
6 like Yahoo or other organizations, it's clear
7 that they see this as really the key to their
8 strategy and they're even willing to incur
9 losses on some properties in order to generate
10 more value. I think Mr. Roback mentioned that
11 it was important to include music in the
12 instant messaging products so that they could
13 attract more listeners. So it may be a value
14 that is great or greater than the direct
15 value. It could easily lead to arguably a
16 doubling of the value. I would not think that
17 that would be an unreasonable sort of order of
18 magnitude effect.

19 But I think that I only wanted to
20 base my factual calculations on numbers I
21 could cite and point to and leave basically a
22 cushion that probably the true rate would be

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1 somewhat higher than that, possibly as I
2 mentioned up to twice as high.

3 MR. SMITH: Is that a factor that
4 ought to be considered -- I'm sorry. Are you
5 done, Your Honor?

6 BY MR. SMITH:

7 Q Is that a factor that the judges
8 would want to consider? If they have a range
9 of possible rates, would that be something
10 that would tell them where to land on that
11 range?

12 A I'm not sure I understand your
13 question.

14 Q If the analysis otherwise leads to
15 a range from a certain figure up to another
16 figure would this then be a factor that would
17 tell them where to land on the high end?

18 A Yes. Okay. I understand what
19 you're saying.

20 MR. JOSEPH: Your Honor, if I may.
21 I would just object.

22 CHIEF JUDGE SLEDGE: Sustained.

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1 MR. JOSEPH: Thank you, Your
2 Honor.

3 BY MR. SMITH:

4 Q Now does the existence of this
5 additional unquantified benefit depend on
6 whether the amount of traffic going from other
7 parts of a portal to the music area is greater
8 or less than the traffic going from the music
9 area out to the other parts of the portal?

10 A No, I think that's another one of
11 those red herrings. The spillovers come from
12 the fact that there's synergies among the
13 different sites and that people -- there's a
14 branding and there's a visibility. It doesn't
15 depend, you know, literally on the movement of
16 the click stream from one part of the site to
17 the other part of the site.

18 In fact, it's quite possible that
19 the revenue benefits go in the exact opposite
20 direction of the click stream. I mean for
21 instance people may find that Yahoo music is
22 a valuable part of Yahoo overall and the way

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1 they get to it is they go to Yahoo's home
2 page, their main portal page. They click
3 through. I think Mr. Roback suggested that
4 would be the best way to get to music. You
5 click through from the home page and you get
6 eventually to the music page and the music.
7 So in that particular case, the traffic would
8 be from other parts of Yahoo to the music
9 site.

10 You get the value being created is
11 at the music site and the revenue would
12 probably be recognized as I understand how
13 they do their accounting at Yahoo's home page.
14 So it's quite possible that the flow of
15 clicks, that the flow of eyeballs if you will,
16 would go in the opposite direction or other
17 directions from the flow of value created.

18 Q Let's turn then to the next
19 section of your rebuttal testimony which has
20 to do with exit and entry in the market. Let
21 me start off with the discussion of exit in
22 Part 4.1 of your rebuttal and what is your

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1 response to the evidence that DiMA put on in
2 the first phase of this case with respect to
3 how many webcasters have left the marketplace
4 from 2001 forward?

5 **A Well, churn is a characteristic of**
6 **any new industry like this one. It would be**
7 **remarkable, it would be a major finding, if**
8 **you had a new industry that didn't have churn**
9 **with companies entering and exiting.**
10 **Certainly you would expect to see it in the**
11 **webcasting market. As I mentioned in my**
12 **report, we saw in radio itself when radio was**
13 **a new technology back in the 1920s. There**
14 **were a lot of companies that entered and a lot**
15 **of companies that exited. Over half of the**
16 **companies that were the first ones to enter in**
17 **a given state actually went out of business in**
18 **1922 through 1924.**

19 **Now did that mean that radio was a**
20 **moribund unsuccessful technology? No, of**
21 **course not. In fact, the stations that**
22 **remained in 1924, the vast majority of them,**

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1 **continued to stay in business for the next 70**
2 **years. There's a similar factor in most**
3 **markets including webcasting.**

4 **Q Now the next thing you focus on is**
5 **entry into the -- Oh, did you have another**
6 **point?**

7 **A Actually, I may have understated**
8 **it when I said similar webcasting because in**
9 **the webcasting market there's this additional**
10 **fact that the initial entrants didn't have to**
11 **pay at all for one of their primary inputs**
12 **namely the sound recordings. So when the CARP**
13 **imposed a price you would of course expect**
14 **that there would be a bump in the amount of**
15 **exit once they had to start paying.**

16 **Q Okay. The next topic is entry**
17 **into the market in recent times by**
18 **simulcasters. Can you tell us why you focused**
19 **on that issue?**

20 **A Sure. There was a contention made**
21 **by the simulcasters that this was not an**
22 **attractive market and very few of them had**

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1 **entered. So I sought to validate whether that**
2 **was in fact the case.**

3 **Q Did you find it to be true?**

4 **A No, in fact, I found precisely the**
5 **opposite to be the case.**

6 **Q Professor Brynjolfsson, I put on**
7 **the board Table 1 from your rebuttal. It**
8 **appeared, I believe, on page 23 and is this a**
9 **part of your analysis of the actual degree of**
10 **entry into the marketplace by simulcasters in**
11 **recent months?**

12 **A Yes. I thought that Mr.**
13 **Halyburton's idea of looking at the actual**
14 **entry was a good one. So we sought to**
15 **replicate that and indeed in the first three**
16 **columns here that I'm pointing to of numbers**
17 **(Indicating) we just again report the exact**
18 **numbers that Mr. Halyburton reported earlier.**

19 **Q Did you attempt to replicate at a**
20 **later point in time his analysis and identify**
21 **how many simulcasters were in the market as of**
22 **September 2006?**

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1 **A Yes. We weren't real creative.**
2 **We just did what he did and I asked the**
3 **analysis group to go out and look at the data**
4 **on the stations that are actually streaming**
5 **and they went to the same, the exact**
6 **identical, markets that Mr. Halyburton went to**
7 **and recorded the ones that were streaming.**
8 **This was just done a couple months ago. So**
9 **it's from September 2006 versus October 2005.**

10 **What you see is that a number of**
11 **stations in the top 25 markets has increased,**
12 **their streaming has increased from 423 to 790**
13 **and that constitutes over 61 percent of all**
14 **radio stations. If you look at all 51 markets**
15 **excluding Puerto Rico, it's just that Mr.**
16 **Halyburton didn't included Puerto Rico, so we**
17 **didn't, it would be comparable. You see that**
18 **the share that were streaming went from 32**
19 **percent to over 57 percent in those markets.**

20 **Q Now how did the analysis group go**
21 **about actually identifying those stations that**
22 **are streaming in September of 2006?**

1 A Well, they started the same thing
2 that he did was which was you went to Radio
3 Locators. It's a website that provides a list
4 of all the streaming radio stations. So the
5 first thing we did was just went to them and
6 saw -- You could just very simply click
7 through to the site we're streaming and verify
8 that if Radio Locators said that it was
9 streaming, we verified whether it actually was
10 streaming. We found that in every case that
11 Radio Locators said that it was streaming it
12 was in fact streaming.

13 However in some cases, Radio
14 Locators did not say that it was streaming.
15 So I asked the analysis group to go ahead and
16 go to the home page of those stations. They
17 all had home pages and see whether or not they
18 were streaming and they found that in many
19 cases even stations that weren't listed in
20 Radio Locator were in fact streaming music. So
21 I asked them to include those stations as
22 well. I understand that's also what Mr.

1 Halyburton did or attempted to do.

2 Q Now do you have any basis to say
3 for sure whether or not that increase in the
4 top 25 markets from 36.2 percent streaming to
5 61.5 percent streaming --

6 A Right.

7 Q -- in 11 months is a reflection of
8 entry as opposed to simply bad data collection
9 by Mr. Halyburton back in 2005?

10 A We have no way of knowing for sure
11 how much of it was due to each of those
12 factors. I suspect that maybe some of each.
13 Certainly, we've seen a lot of entry into the
14 market if you look at other sources of data.
15 But also we found that the Radio Locators data
16 was less reliable than Dr. Halyburton or Mr.
17 Halyburton said that he thought it was. So it
18 may be that they simply missed stations that
19 were streaming that actually were streaming.

20 Q Let me ask you to turn over to
21 Table --

22 JUDGE ROBERTS: Can I just ask one

1 question?

2 MR. SMITH: Yes.

3 JUDGE ROBERTS: If Radio Locator
4 said that the station was streaming --

5 THE WITNESS: Yes.

6 JUDGE ROBERTS: -- would you have
7 your group look and see if maybe they weren't?

8 THE WITNESS: Yes.

9 JUDGE ROBERTS: You did?

10 THE WITNESS: Yes. We checked
11 everyone and in every single case where Radio
12 Locator said it was streaming, they found that
13 in fact yes it was streaming. So the only
14 errors were the second type of Radio Locator
15 not listing the streaming but in fact, it was.

16 JUDGE ROBERTS: Thank you.

17 BY MR. SMITH:

18 Q Let me ask you to turn over Table
19 2 on page 25. I don't think we have a blowup
20 of this one, Professor, but this focuses on
21 the top nine markets. Can you tell us why you
22 separately reported data with respect to those

1 nine?

2 A Sure. It's a lot of work to go
3 and check each one of these stations. We see
4 that there are hundreds or thousands to be
5 checked and so Mr. Halyburton reports that he
6 conducted a particularly thorough search of
7 just the top nine markets, I guess, with the
8 assistance of Ms. Lawyer or maybe it's Ms.
9 Lawyer who did it for him. So these are the
10 ones that I think we have more confidence that
11 he verified they actually were streaming. So
12 if you limited the comparison just to that
13 set, if you look at the bottom here, it's on
14 page 25, you look at say -- take the last
15 line, the total number of stations that were
16 streaming in October 2005 according to Mr.
17 Halyburton was 35 percent or 191 stations and
18 by September 2006, the number of stations
19 streaming had doubled to 382 constituting 61.9
20 percent of all of the stations. And so --

21 Q How does that compare with the
22 overall numbers you had reported in Figure 1

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1 then, Table 1?

2 A It's actually very comparable. I
3 mean you get broadly the same numbers,
4 actually a smidgen higher but they're probably
5 within noise level. So since these were the
6 ones that he checked particularly carefully,
7 we think we have more confidence that this is
8 actual entry into the marketplace over the
9 past 11 months.

10 Q What does that kind of entry tell
11 you about market conditions?

12 A Well, it's the same story again.
13 We're seeing every way we look at the data
14 which is that costs have come down. Revenues
15 have gone up. This is an attractive market
16 and more and more companies are voting with
17 their feet if you will, deciding to enter.
18 They find it a good value proposition in
19 droves really. I should this is an
20 extraordinarily rapid pace of entry for any
21 industry. So you have to have very, very
22 attractive conditions to get that level of

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1 entry.

2 Q Now referring back to top of page
3 21, what does the data show us about Clear
4 Channel in particular and whether it is
5 entering the market?

6 A It shows another corroboration of
7 the same point. We can look at it from a
8 number of different perspectives is what Mr.
9 Parsons said and if you look at -- I think it
10 actually starts at the bottom of page 20.

11 Q Correct.

12 A Back in 2003, there are apparently
13 no stations that Clear Channel had streaming
14 on the internet. By 2004, it was 150. Eight
15 months later it was 583 Clear Channel stations
16 were streaming. This is also what the Wall
17 Street Journal reported when they said about
18 half of the 1200 stations were streaming. So
19 you see this extraordinary entry, very rapid
20 entry, a rush to move into this opportunity.

21 Q Now did you also study growth of
22 revenue from streaming in the simulcaster

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1 industry?

2 A I did my best. I guess in
3 discovery they provided some data which I did
4 my best to interpret the revenues and costs
5 that the simulcasters were reporting.

6 Q Referring then to Figure 7 in your
7 rebuttal, what is this portraying?

8 A So here is the data that Clear
9 Channel provided on their revenues from
10 streaming. As you can see it wasn't quite
11 zero but it was very low in 2003. 2004 --

12 MR. JOSEPH: Excuse me, Your
13 Honor, a second. But I believe we're getting
14 into material that has been identified and put
15 into record as protective under the Protective
16 Order and I just wanted to ask that the
17 discussion with specific numbers, first of
18 all, that I think that we're going to have to
19 ask that -- I'm going to have to move that the
20 room be closed to be conducted under the
21 Protective Order with that demonstrative up
22 there and that discussion of specific numbers

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1 be identified as restricted.

2 CHIEF JUDGE SLEDGE: Any objection
3 to applying the Protective Order to Figure 7
4 and testimony related to the Figure 7?

5 MR. SMITH: No Your Honor.

6 CHIEF JUDGE SLEDGE: Objection --
7 The motion is granted.

8 MR. JOSEPH: Thank you, Your
9 Honor. Off the record.

10 (Whereupon, at 11:35 a.m., the
11 above-entitled matter recessed and reconvened
12 at 11:40 a.m. the same day.)
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22

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1 CHIEF JUDGE SLEDGE: On the
2 record.

3 DIRECT EXAMINATION (Cont'd)
4 BY MR. SMITH:

5 Q Do you have information about how
6 it was that Clear Channel categorized the
7 review that they were willing to label as
8 "streaming revenue"?

9 A Yes.

10 Q What they included and what they
11 explained.

12 A So they made some judgements about
13 how they would account for this revenue and as
14 I recall Mr. Parsons, let me see if I can find
15 his exact words, stated that they did not
16 include some types of advertising that perhaps
17 should have been included. Specifically, he
18 testified that they include "in-stream ads,
19 gateway ads and banner ads" as it says on the
20 top of page 27 but apparently did not include
21 banner ads from the websites even though one
22 of the main reasons that people go to the

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1 websites is to listen to streaming radio.

2 In fact, he himself said that
3 people who came, who streamed, music were two
4 to three times as likely to come to the
5 website as people who didn't stream music.
6 However, he apparently -- Their policy was
7 apparently not to count that as revenues.

8 Furthermore, he noted that they
9 would -- It was not uncommon for them to give
10 away streaming in-stream ads as part of a
11 bundle for advertisers who bought over-the-air
12 ads. Again, economically speaking, you would
13 expect all of that revenue to have been
14 created by the -- all the in-stream ad revenue
15 to have been created by the streaming radio.
16 Yet none of it was accounted for in these
17 numbers. So in that sense, the way they
18 account for the numbers I believe leads to a
19 significant underestimate of the actual
20 revenues.

21 Q And just so we're clear, the
22 banners and other gateway ads and in-streams

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1 ads that they did count, where did those
2 appear?

3 A I believe they count them as just
4 internet.

5 Q No, the ones they did count, not
6 the ones they didn't count.

7 A Oh, they did count. Yes, so they
8 counted as streaming revenues.

9 Q But where? You said they didn't
10 appear on the website. Where did they appear?

11 A Oh, so their banners -- You don't
12 mean actually the count of stream. You mean
13 they actually fit -- Okay. So they appeared
14 for instance on the player which is really not
15 a very valuable spot at all for advertising.

16 Q And why is that?

17 A People may minimize it. Just in
18 general, the CPMs tend to be much lower for
19 that, whereas the ads on the website itself
20 are quite lucrative.

21 Q Okay. Now did you also look at
22 and I don't want you to get into the specifics

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1 at the moment, you also looked at the revenue
2 growth for Bonneville and Susquehanna, two
3 other simulcasters.

4 A Yes.

5 Q And can you tell us just where in
6 your report -- Well, strike that. Is the
7 Bonneville revenue represented in --

8 A Figure 2.

9 Q -- Figure 2 on page 408?

10 A Yes.

11 Q And is that consistent with the
12 revenue growth that you reported for Clear
13 Channel?

14 A Yes, broadly consistent. You see
15 this tremendous growth in streaming revenues
16 and it doesn't matter whether you include that
17 one particular station or not. You still get
18 a similar pattern.

19 Q And if you -- Without giving
20 specific numbers, what did you find with
21 respect to Susquehanna?

22 A So you could see in Figure 5 some

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1 evidence on their internet revenue and
2 expense.

3 Q Did you get separate streaming
4 revenue information from Susquehanna?

5 A I thought I did.

6 Q Let me refer to, refresh your
7 recollection, to the bottom of page 30.

8 A Right. Yes, we didn't make a
9 graph of that. Yes. So we did.

10 Q And what kind of a pattern did you
11 see there, not using numbers?

12 A Again, as it says at the bottom of
13 page 30, they increased quite dramatically.
14 I won't say the exact numbers, but you can
15 read them there and again as with the other
16 ones, most of the increase appeared to have
17 occurred just relatively recently with last
18 half of 2005 and one would presume continuing
19 on in 2006.

20 Q Now in preparing for your
21 testimony, did you have anything that
22 concerned about the data collection with

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1 respect to Susquehanna?

2 A Yes, in each case they provided
3 these tables of numbers that sometimes were
4 extremely small and blurry and the columns,
5 you know, I had to make some inferences what
6 the columns referred to. In the case of
7 Susquehanna, I went back and looked at that
8 again recently and this figure that I mention
9 in here of -- Should I say the number?

10 Q The 2005 figure, how's that?

11 A Yes, the 2005 figure, that one I
12 went back and I'm not sure that I have
13 complete confidence in that particular number.
14 The way it was labeled was ambiguous and
15 that's my best estimate that it represents
16 their streaming revenues. But I'm not
17 certain.

18 Q Did you also get information about
19 Clear Channel's streaming related expenses?

20 A No, I don't think so.

21 Q Clear Channel?

22 A Oh, Clear -- I'm sorry. I thought

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1 you said Susquehanna. Okay. Yes. Clear
2 Channel, we did have streaming expenses and
3 aren't those -- Those are represented in
4 Figure 9.

5 Q And then are they the same data as
6 represented as well in Figure 11? Is that
7 correct?

8 A Yes.

9 Q Okay. Why don't you tell us
10 generally how expenses relate to streaming
11 revenue for Clear Channel without using the
12 numbers during 2005?

13 A Yes. So the expenses have grown
14 somewhat as their activities presumably have
15 grown, but the revenues have grown more
16 rapidly and there's a growing surplus of
17 revenue over expenses over time.

18 Q The next topic, Professor, is your
19 discussion of the promotional effects of
20 webcasting and how you would respond to DiMA's
21 witnesses who testified on that subject.
22 What's your basic opinion about the relevance

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1 of promotion as a factor that ought to be
2 considered here in setting the rate?

3 A Certainly, promotion is one of the
4 factors that I think a willing buyer/willing
5 seller would take into account.

6 Q Okay. Now but what's your
7 assessment in terms of whether or not that
8 would play a significant role in setting a
9 rate for a blanket license to all the
10 material?

11 A So conceptually it's something
12 they would consider. However, specifically,
13 we don't know whether -- What's important for
14 promotion is whether the net promotional
15 effect is positive or negative.

16 Q What do you mean by net
17 promotional effect?

18 A When companies webcast, there may
19 be some promotional benefits in terms of
20 selling additional CDs or other types of sound
21 recordings, but there is also going to be some
22 substitution as I mentioned earlier. People

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1 who listen to a webcast generally aren't
2 listening at the same time to some other sound
3 recording. They may substitute. In fact, I'm
4 sure they do on occasion substitute webcast
5 listening for other ways of listening to
6 music. So I'm not aware of any evidence that
7 the net effect is positive, negative or zero.
8 So I don't know that we have any basis for
9 making any sort of a blanket adjustment.

10 Q Now based on your review of the
11 testimony from the first phase of the case,
12 what's your assessment of the category of
13 sound recordings that are most likely to have
14 a net positive promotional effect?

15 A Well, there may be some artists
16 for which the net is more likely to be
17 positive and others that it's more likely to
18 be negative. I think the consensus in the
19 industry is that brand new artists or new
20 albums are more likely to benefit from
21 promotion. As Dr. Jaffe put it, I think he
22 said that record companies have long

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1 recognized that the promotion value inherit
2 and traditional over the air play and have
3 worked with terrestrial radio stations to
4 promote new artists and new albums. So I
5 think that those would be ones that would be
6 most likely to benefit the new artists and new
7 albums.

8 Q And if the willing buyer and
9 willing seller were to conclude that the
10 promotional benefit is focused primarily on
11 new artists and new albums how would that
12 affect the price if you were setting a price
13 for the whole blanket license?

14 A Well, it wouldn't make sense to
15 incorporate it into a blanket license. I mean
16 if the promotion is for a small subset or a
17 subset of an artist, that's where you'd want
18 to target the promotion and indeed according
19 to Jay Frank at Yahoo only, small fractions
20 are mentioned at the bottom of page 37 and top
21 of page 38, only two or three out of the 6,000
22 to 10,000 songs that Yahoo adds to its service

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1 each week receive the type of additional
2 promotion that they claim increase sales.

3 So a blanket adjustment I don't
4 think would be appropriate. In fact, you'd be
5 penalizing people who might be hurt by the
6 promotion. If somebody was an established
7 artist with an established album they might
8 actually be hurt by this kind of promotion.
9 So I don't think there's any doubt there's a
10 great deal in variation in how much of the
11 promotional effect, how big a promotional
12 effect is, and what you'd want to do is
13 therefore target your promotion to those
14 artists or albums that could benefit from
15 them.

16 Q And how would you compensate the
17 webcasters for that promotional benefit in a
18 free market situation?

19 A Well, I believe it's very
20 straightforward, very easy to do. You just
21 offer than all sorts of inducements, whether
22 it's give them discounts on those plays, those

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1 specific plays. Give them T-shirts. Have
2 stuff, paraphernalia that they can use in
3 their contests. You could have a general
4 arrangement that here are the three new
5 artists this month, this week, that we want to
6 have you promote and we're going to discount
7 or even eliminate the air time charges for
8 some percentage of your webcasting in exchange
9 for promoting these artists, be very
10 straightforward and there are people who are
11 very expert in designing these campaigns that
12 often involve many different components to
13 generate this kind of promotion.

14 JUDGE WISNIEWSKI: Just a second.
15 If I could back up here just a few minutes
16 ago.

17 THE WITNESS: Sure.

18 JUDGE WISNIEWSKI: Is it my
19 understanding that you view this promotional
20 aspect as a zero sum game?

21 THE WITNESS: I don't know what it
22 is. I mean there's so aspects in which it may

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1 well be a zero sum game . First off, there's
2 the question as to whether or not there's new
3 promotion or net substitution over all by
4 webcasting. Secondly, even for the portion
5 that's promotion, most of it I think is
6 basically a zero sum game.

7 Most of it when you get somebody
8 to buy one album instead of another album,
9 that's going to benefit one artist and hurt
10 the other artist. I think that's the vast
11 majority of the effect. As to how much of it
12 leads to just an overall increase in album
13 sales, I don't think there's any evidence on
14 that one way or the other. But the key point
15 is that it varies tremendously from one artist
16 to another.

17 BY MR. SMITH:

18 Q Now I wonder if we could turn then
19 to Section 7 on noncommercial stations, a
20 subject you've already heard a little bit
21 about, but if we could summarize. Now is it
22 your belief based on your economic analysis

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1 that the willing seller in this hypothetical
2 market would set a special lower rate for
3 noncommercial stations that are unable to pay
4 the commercial rate?

5 A So -- No. The answer is no.

6 Q Can you tell us why not?

7 A Sure. In some industries you may
8 want to try to offer different prices for
9 different customers. But in this industry,
10 we're looking at essentially a digitally
11 identical product and the listener can very
12 trivially move from one station to another
13 station just with a click of the mouse. So if
14 you're offering the identical product and
15 listeners can easily transfer from one to the
16 other the risk of cannibalization is very real
17 and it's enormous. That means that if you
18 offered a lower rate to one set of customers
19 it's possible, even likely, that listeners
20 would go to the place that had lower
21 subscription prices or fewer ads or whatever
22 to listen to the exact same product. That

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1 would undercut your sales from your other
2 customers and ultimately hurt your overall
3 revenues.

4 Q Now if the seller decided to go
5 ahead and take that risks, are there ways as
6 you suggested here that they could minimize
7 the risk of cannibalism or at least minimize
8 the impact of cannibalism?

9 A Yes, it's my judgment that just to
10 be clear it would not be wise business
11 decision and it wouldn't make economic sense
12 to do this. But if there was other reason you
13 decided to offer lower rates for other reasons
14 that were noneconomic and not based on
15 business profit maximization you could set
16 some sort of a cap so that if the
17 cannibalization got very severe it would stop.
18 You could for instance have a maximum number
19 of listeners that you would be able to have
20 and still be subject to the favorable rate.

21 Q Now you also say in Section 7 that
22 many noncommercial stations increasingly

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1 resemble commercial stations in all aspects
2 relevant both to this proceeding and the
3 willing buyer/willing seller standard. Can
4 you tell us what you mean by that?

5 A Yes. Basically in terms of the
6 product that they're offering and the
7 listeners that they get, they are very, very
8 similar and in terms of their revenue streams,
9 they are very similar, increasingly similar.
10 Much of the underwriting and sponsorship at
11 noncommercial stations very closely resembles
12 advertising. They go to many of the same
13 potential advertisers and they offer then
14 either an in-stream or types of consideration
15 that are very closely substitutable for
16 advertising.

17 Q And did you also in your empirical
18 research here come across noncommercial
19 stations that are entering into the side
20 channel marketplace?

21 A Yes, quite a few of them. NPR
22 offers side channels and they even sell them

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1 to other stations to stream just as Clear
2 Channel and others do. I understand they
3 recently even are opening some sort of a
4 portal potentially.

5 Q Can you tell us what you
6 understand the NPR portal to be all about?

7 A Yes. It's a site where people can
8 go and get music and learn about it and
9 download and it really has many of the
10 characteristics of other music portals and I
11 think would be seen as a direct competitor.

12 MR. TAYLOR: I object. There is
13 no discussion of NPR's portals in his rebuttal
14 testimony, Your Honor.

15 MR. SMITH: I believe there is,
16 Your Honor. Let me just check.

17 CHIEF JUDGE SLEDGE: We seem to
18 have an exhibit about it that the site was on.
19 I'm quite sure about that.

20 THE WITNESS: Yes. It says right
21 here at the top of page 41, "NPR is also
22 developing a digital music distribution portal

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1 to be launched at the end of this year" and it
2 references Exhibit 212 RP.

3 MR. TAYLOR: My apologies, Your
4 Honor.

5 CHIEF JUDGE SLEDGE: Overruled.

6 BY MR. SMITH:

7 Q Now assuming a seller decided that
8 the cannibalization risk was too high as you
9 recommend, how would that seller go about
10 deciding where to set the price and how many
11 buyers to sort of allow to be among those who
12 could afford to buy the product?

13 A I think you wouldn't want to have
14 a really huge station with hundreds of
15 thousands of listeners be subject to this
16 lower rate because that would clearly be
17 direct competitor and demand cannibalization.
18 However, I think if it was a very small
19 station, you know, a college station, that
20 didn't have a significant amount of
21 cannibalization, that might be acceptable or
22 at least it wouldn't do a whole lot of damage

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1 to their revenue prospects.

2 Mr. Robedee testified that -- What
3 was his number? I think it was ten. Yes, as
4 it says on page 42, "Many noncommercial
5 stations have ten or fewer listeners at any
6 one time." So say you doubled that and had a
7 cap of 20, that would presumably not adversely
8 affect the many have ten or fewer listeners at
9 a time. So they could benefit from this lower
10 rate without, in my judgment, doing severe
11 damage to the DiMA webcasters and the other
12 webcasters and ultimately to the owners of the
13 sound recordings.

14 Q Just before we conclude,
15 Professor, just to clarify something which
16 I've been informed might not be too clear,
17 going back to the sales of advertising in 2006
18 for Clear Channel by Ronning Lipset, do you
19 have any understanding about whether there are
20 additional advertising dollars that Clear
21 Channel receives for its streaming that were
22 not done through the Ronnie Lipset Agency?

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1 A Certainly, yes. Absolutely. This
2 is just -- My impression is it's largely
3 incremental. They have their own advertising
4 people that are experts. In fact in
5 particular, they make a tremendous amount of
6 revenue from their local markets.

7 MR. SMITH: Your Honor, if I could
8 just have a moment to check with my
9 colleagues.

10 CHIEF JUDGE SLEDGE: Yes sir.

11 MR. SMITH: Nothing further, Your
12 Honor.

13 CHIEF JUDGE SLEDGE: Any cross by
14 DiMA?

15 MR. SUGARMAN: Thank you, Your
16 Honor.

17 CROSS EXAMINATION

18 BY MR. SUGARMAN:

19 Q Good afternoon, Dr. Brynjolfsson.

20 A Good afternoon.

21 Q Would you turn to page three of
22 your written rebuttal statement?

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1 A Yes.

2 Q And at the very top of the page
3 under Subsection B, you there are summarizing
4 one of the points that you say Dr. Jaffe
5 makes. Correct?

6 A Yes. And you say that he says,
7 "All essential inputs with no incremental
8 costs must have the same price." Now you're
9 not saying that he's saying that any time
10 there are two essential inputs with no
11 incremental costs, they must have the same
12 price, are you?

13 A That's my best understanding of
14 his testimony.

15 Q So no matter what the symbiosis if
16 you will between one cost and another is, what
17 you're saying he's saying is if they're both
18 essential they're the same value.

19 A And if there are no incremental
20 costs.

21 Q Right. That's what --

22 A That's what he appeared to be

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1 arguing.

2 Q Now there was some testimony
3 earlier today about Dr. Jaffe's view of
4 whether webcasters will seek to recover a
5 portion of their fixed costs from the revenues
6 derived, I'm sorry, whether the sound
7 recording owners will seek to recover any of
8 their fixed costs from the revenue derived
9 from webcasting revenues. Correct?

10 A Yes.

11 Q And at the bottom of page eight,
12 you're saying that Dr. Jaffe suggests that the
13 owners of sound recordings will not seek to
14 recover a portion of their future fixed costs
15 from webcasting because it's a relatively
16 small market. That's what you're saying he's
17 saying. Right?

18 A That's correct.

19 Q Okay. Now first of all, isn't it
20 an infinitesimal not relatively small portion
21 of the webcasters, I'm sorry, of the sound
22 recording owners' revenue?

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1 A No.

2 Q Well, have you done any analysis
3 of the percent of the sound recording owners'
4 revenue that comes from the royalties from
5 webcasting?

6 A Broadly speaking, yes.

7 Q And don't you find that that ratio
8 is basically, well, one-tenth of a percent of
9 the \$7 billion of revenues to the sound
10 recording owners comes from the royalties?

11 A I think that's approximately the
12 right ratio.

13 Q So you wouldn't say that
14 infinitesimal?

15 A No, infinitesimal means
16 arbitrarily close to zero. Infinitesimal is
17 basically indistinguishable from zero. You
18 just pointed out that it amounts to millions
19 of dollars. To me, millions of dollars is not
20 infinitesimal --

21 Q Even when compared to \$7 billion
22 of revenue, that's what you're saying.

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1 A You can compare it to any number
2 you want. It's still millions of dollars.

3 Q Okay. Now isn't it true that what
4 Dr. Jaffe is really saying is that just like
5 any other profit maximizing business, the
6 owners of the sound recording will seek to
7 realize as much revenue from any source as
8 possible? That's what he says, isn't it?

9 A At one point he does that,
10 something like that, as I recall.

11 Q Something like that, but he says
12 that because the revenues are such a small
13 part, we'll not say infinitesimal.

14 A I'd say relatively small.

15 Q Well, such a small part, they
16 don't depend on it to recover fixed costs.
17 That's what he says, isn't that right?

18 A I think he says something like
19 that.

20 Q Okay, and that argument that he
21 makes was really a response to the argument
22 that was made by either you or Dr. Pelcovits

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1 that says that the sunk costs argument is
2 invalid because the sound recording owners if
3 they don't get high revenue will --

4 (Off the record comments.)

5 BY MR. SUGARMAN:

6 Q Let me start again. Wasn't Dr.
7 Jaffe's argument about the sound recording
8 owners not looking to webcasting revenues
9 really a response to an argument that the
10 sound recording owners were making is that if
11 you lower revenues you're going to inhibit the
12 creation of new music?

13 A **I think it may well have been.**

14 Q Okay, and isn't the fact that
15 first of all the decision to license or not
16 license by the sound recording owners will
17 have no impact on their decisions to spend
18 dollars in the creation of new music?

19 A **What was the very first part of
20 your question there?**

21 Q Isn't it true that the decision to
22 license or not license in this market will

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1 have no impact on the decisions that the sound
2 recording owners make with respect to the
3 amount of money that they're going to spend to
4 create new music?

5 A **No, I don't think that's true.**

6 Q Isn't there testimony in this very
7 case that that's true?

8 MR. SMITH: Objection, Your Honor.
9 I don't believe that's a proffer of
10 impeachment. It just states in their
11 testimony somewhere, a sixth month proceeding
12 --

13 MR. SUGARMAN: Have you --

14 CHIEF JUDGE SLEDGE: Overruled.

15 MR. SUGARMAN: You may answer the
16 question.

17 THE WITNESS: I think there is --
18 My recollection is there is some testimony
19 specifically to the opposite that the revenues
20 that are provided by Sound Exchange have a
21 very real effect on the ability of -- on the
22 creation of music.

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1 BY MR. SUGARMAN:

2 Q And is that the testimony that
3 you've cited in your report about the Broken
4 Down Bus for Room Full of Blues?

5 A **Yes.**

6 Q Okay. I'll get to that in a
7 second, but aren't you familiar with Mr.
8 Kushner's testimony in which he said that the
9 investments that his company makes in the
10 value chain of music are investments that they
11 make basically irrespective of the presence or
12 existence of webcasting? Are you aware of
13 that testimony?

14 A **I'm vaguely aware of it. I don't
15 recall specifically reading that.**

16 Q And he then goes on to say that
17 those expenses would be made if webcasting
18 disappeared from the planet. Did you read
19 that?

20 A **I don't recall.**

21 Q That testimony you would agree
22 with me would validate the point that no

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1 matter whether there's a webcasting license or
2 not and whether it's X or XXX would make no
3 difference in the label's decisions with
4 respect to the value chain of music. Right?

5 A **No, I don't agree.**

6 Q You don't agree.

7 A **I think that would be a
8 misunderstanding of how these decisions are
9 made.**

10 Q Now let's talk about the Room Full
11 of Blues which you talk about on page nine of
12 your testimony and you're referring to that
13 testimony as I understand it to demonstrate
14 the point in which you make in the first full
15 page on page nine where you say, "In
16 particular, the ability of labels to pay the
17 costs of music creation is effected by each
18 dollar of revenue they receive." Then you go
19 on to give the example of the Room Full of
20 Blues and Room Full of Blues is not a label.
21 Correct?

22 A **That's correct.**

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1 Q It's a band.

2 A **That's correct.**

3 Q Okay. So at the very first level,
4 the royalties that are received by Room Full
5 of Blues have nothing to do with the ability
6 of their label, whomever that is, to create
7 music. Isn't that right?

8 A **No, that's not correct.**

9 Q Well, Room Full of Blues is not a
10 label. We agreed on that.

11 A **Yes, that's correct.**

12 Q And I think what you said at your
13 deposition is that you viewed this example as
14 allowing Room Full of Blues to fix its bus and
15 get to its gig and create music. Right?

16 A **Yes, that's correct.**

17 Q Okay. So that's helping the
18 ability of the band to get to the gig and
19 create music. Right?

20 A **Yes.**

21 Q That has nothing to do with the
22 ability of the band's label to create music,

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1 does it?

2 A **I wouldn't say it has nothing to
3 do with it.**

4 Q Well, that's not the thrust of the
5 example you were giving. The thrust of the
6 example you were giving is this royalty
7 allowed the band to fix the bus and get to the
8 gig and create music. Right?

9 A **The thrust of the argument was
10 that Sound Exchange provides royalties which
11 are paid to bands and labels. It was a little
12 bit unclear from what Mr. Iglauer say as to
13 whether the check came through the label. I
14 know that the label also gets checks often
15 times in conjunction with it. A lot of labels
16 will deduct their own costs for artist's
17 repertoire costs before they turn over the
18 residue to the bands. So they work quite
19 closely in making the bands successful. Often
20 the label will front significant costs to get
21 the band going and then deduct from that,
22 deduct those expenses from the revenues they**

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1 **get from Sound Exchange and other sources. So**
2 **the thrust of the argument that you asked**
3 **about, this is an example of revenues coming**
4 **in, allowing music creation to continue as**
5 **Alligator Records, Mr. Iglauer's label, work**
6 **closely with Room Full of Blues to do**
7 **precisely that.**

8 MR. SUGARMAN: Your Honor, I move
9 to strike that answer. All of what he just
10 said with respect to what labels might do and
11 the amount that they pass on or don't pass on
12 appears nowhere in his rebuttal report which
13 deals only as I read it with the ability of
14 this band to fix its bus and get to its gig.

15 CHIEF JUDGE SLEDGE: Motion
16 denied. He's answering the question.

17 BY MR. SUGARMAN:

18 Q Now, Dr. Brynjolfsson, though all
19 of this testimony with respect to the recovery
20 of costs is relevant in economic terms to the
21 question of whether the costs that are
22 expended by the sound recording owners have

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1 any impact on their decisions, I'm sorry,
2 whether the licensing would have any impact on
3 their decisions to create additional music.
4 Isn't that right?

5 A **Not exactly.**

6 Q Let me put it a different way.
7 Isn't the -- We talk a lot about sunk costs.
8 Okay? And just so we're clear what sunk cost
9 means sunk costs include those which have been
10 expended in that past. Correct?

11 A **Yes, that's correct.**

12 Q And would include any costs to be
13 expended in the future if the decision to
14 expend those costs was irreversible. Right?

15 A **If the decision had already been
16 made and it's irreversible, then that would
17 also be considered a sunk cost.**

18 Q Okay. So as is relevant to this
19 case, if the decisions with respect to the
20 albums that the record companies are going to
21 be releasing in the next five years have
22 already irreversibly been made, then you would

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1 agree that those costs are sunk costs. Right?

2 **A This is a hypothetical?**

3 **Q** I'll treat it as a hypothetical
4 and I mean it bears some --

5 **A I don't think it bears any**
6 **relationship to what actually happens, but**
7 **hypothetically if they made all their**
8 **commitments now irreversibly to what music**
9 **they would be creating for the next five**
10 **years, then those would be sunk costs.**

11 **Q** Sunk costs. Okay. Whether that's
12 borne out by the record that's something that
13 the judges will decide.

14 **A Yes.**

15 **Q** Not me. So the economic relevance
16 of sunk costs is that licensors don't consider
17 them when deciding whether to license. Right?

18 **A If they're being fully rational,**
19 **they shouldn't. Right.**

20 **Q** Okay. Now switching to a
21 different subject for a second, your model
22 depends, does it not, on the accurate

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1 estimation of revenues and costs?

2 **A Well, the degree of precision of**
3 **the answer will be related to the degree of**
4 **precision of the data in that sense. Yes.**

5 **Q** Put another way if the cost and
6 revenue estimates that you're making going
7 forward are unreliable then your model and the
8 underpinnings of your model would as well be
9 unreliable.

10 **A They would have a reliability that**
11 **would be a function of the various different**
12 **sources of data. Absolutely.**

13 **Q** And you would agree with me that
14 there is certainly some uncertainty with
15 respect to predicting the costs and revenues
16 in this business as with any business.

17 **A As with any business, there is**
18 **going to be ranges of uncertainty, probably**
19 **less in this case than many others.**

20 **Q** Now you talked a bit in your
21 testimony about the market and the competitive
22 nature of the market.

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1 **A Are you referring to a particular**
2 **point?**

3 **Q** Well, I think there was some
4 general testimony this morning about whether
5 the market was competitive, not competitive.
6 It's also in your report, but let's focus it
7 more clearly. Please turn to page ten of your
8 written testimony and you're here talking
9 about the benchmark that Dr. Pelcovits used in
10 the second paragraph and you're saying that,
11 about five lines down, "Furthermore, the
12 market for on-demand sound recordings reflects
13 essentially the same buyers and sellers and
14 essentially the same relative bargaining
15 power." And you're comparing there the on-
16 demand streaming market with the DMCA
17 compliant streaming market which are the two
18 markets Dr. Pelcovits deals with. Correct?

19 **A Yes I am.**

20 **Q** But that statement is at least
21 somewhat inconsistent, isn't it, with the
22 testimony that you gave this morning where you

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1 acknowledged that with respect to the DMCA
2 compliant market the webcasters don't
3 necessarily need the repertoire of all four
4 labels where I assume you would agree that in
5 the on-demand market the webcasters do need
6 all four?

7 **A You're assuming incorrectly.**

8 **Q** Excuse me?

9 **A You're assuming incorrectly.**

10 **Q** Incorrectly, I see. But you did
11 say this morning -- Well, let me restart. You
12 would agree that with respect to the on-demand
13 streaming market the webcasters need the
14 repertoire of all four labels, would you not?

15 **A No, I wouldn't.**

16 **Q** So you're saying that even with
17 respect to the on-demand market, a webcaster
18 could exist without all four. Is that what
19 you're saying?

20 **A Yes, that's what I'm saying.**

21 **Q** Okay. And so having said that,
22 you say that the DMCA compliant market is the

1 same in that regard.

2 **A It's the same -- I'd say it's**
3 **similar.**

4 **Q Similar, okay. Do you see -- You**
5 **do see some difference, don't you, between the**
6 **necessity of the webcasters in the on-demand**
7 **market to have all four as opposed to the**
8 **necessity of the webcasters in the DMCA**
9 **compliant market to have all four?**

10 **A I think they are broadly similar.**
11 **As I noted here, I think they are quite**
12 **similar markets, quite similar groups. One**
13 **difference is of course that by definition in**
14 **DMCA market we have a statutory license. So**
15 **people can just -- They automatically have a**
16 **license. So there's no real decision to be**
17 **made about whether you use all four. In the**
18 **on-demand market, they actually have to choose**
19 **whether or not they use the major record**
20 **labels or not. So we have some evidence that**
21 **in fact that in some cases they choose not to.**

22 **Q Are you familiar with the**

1 terminology which is sometimes used to
2 describe these two markets which is on-demand
3 and DMCA compliance as one's a pull market and
4 one's a push market? Have you heard that?

5 **A I've heard pull and push. I**
6 **actually don't recall it being applied**
7 **specifically to those two markets.**

8 **Q Would it refresh your recollection**
9 **if I told you that the pull market is**
10 **describing the on-demand market because in**
11 **that market the listener pulls in the music**
12 **and the push market is the DMCA compliant**
13 **market because in that instance the webcasters**
14 **push the music.**

15 **A If someone were to describe them**
16 **that way, I would say that would be a vast**
17 **oversimplification. In fact, the reality is**
18 **that in both markets the webcasters have**
19 **significant influence over what songs people**
20 **listen to. If you go to any of the on-demand**
21 **sites, you'll see that people don't just go**
22 **there with this preset list, "Okay, I'm going**

1 **to go listen to these 26 songs in this order."**

2 **On the contrary, the on-demand**
3 **webcasters do all manner of recommender**
4 **engines and guiding towards one song versus**
5 **another. This is the hot song. Similarly, in**
6 **the webcasting market, the webcasters can**
7 **influence what you listen to but they can't**
8 **force you to listen to a particular station**
9 **versus another station. People choose. Some**
10 **people may choose to listen to folk and other**
11 **people may listen to classic rock. So in both**
12 **cases there is some element of influence that**
13 **the webcasters have and there is some element**
14 **of choice on the part of the consumers.**

15 **Q In the on-demand market, the**
16 **listener has the ability, does he or she not,**
17 **to pull the artists and the selections that he**
18 **or she wants to listen to?**

19 **A Yes.**

20 **Q Conversely in the DMCA compliant**
21 **market, and let's talk about the ad supportive**
22 **DMCA compliant market, the listener basically**

1 **tunes in and listens for the next two hours or**
2 **three hours to the selections that are pushed**
3 **to that listener by the webcaster. Correct?**

4 **A Well, as I just stated, I believe**
5 **that the listeners actually have a great deal**
6 **of discretion over what kinds of music they**
7 **listen to in both markets and also for that**
8 **matter the webcasters have discretion over**
9 **which ones they encourage people to listen to.**
10 **But certainly specifically in the case of**
11 **webcasting, it's not like there's just one**
12 **stream you go to. You can't turn any dials**
13 **and make any adjustments. On the contrary,**
14 **there are thousands of streams mainly which**
15 **are extremely focused, extremely narrow, and**
16 **you can have a great deal of choice as to what**
17 **kind of music you listen to. That's one of**
18 **the nice things about webcasting.**

19 **Q But even assuming that that's**
20 **correct in the DMCA compliant market, isn't it**
21 **true that once you've made that decision,**
22 **let's say you want to listen to folk and go on**

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1 a DMCA compliant webcast, you basically sit
2 there and listen to the folk music that's
3 being pushed to you for the next three hours
4 or four hours or two hours. Right?

5 A Or 30 seconds.

6 Q Right.

7 A I don't think -- I think it's a
8 misunderstanding to characterize it the way
9 you characterize it. I think that people will
10 switch around. In fact, I don't recall the
11 exact rules off the top of my head. You even
12 have some choice as to saying there are
13 particular artists, particular songs, you'd
14 like to listen to more frequently. Certainly
15 you can choose different stations and if
16 you're like me, you change stations when you
17 start hearing a song you don't like.

18 Q So are you saying that in a DMCA -
19 - yes, in a DMCA compliant situation when they
20 ask you on the folk station which artists you
21 would like and you say James Taylor or Carly
22 Simon to pick an interesting duo and you're

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1 saying that that influences the music that
2 you're going to hear in the next 30 seconds,
3 30 minutes or three hours?

4 A Certainly I know there are
5 stations that play more like you can use
6 various services that if you want to listen to
7 more James Taylor you can find stations that
8 will play more James Taylor or Carly Simon or
9 anyone else. So you can find those stations
10 and listen to them. As I recall, there is
11 some dispute about the exact rules as to how
12 much control you can have where it stops being
13 DMCA compliant, where it starts being DMCA
14 compliant. I don't remember, sorry, the exact
15 --

16 Q Three hours and one artist and the
17 like?

18 A I don't recall exactly what it is.
19 But I think that the basic point is that most,
20 at least I and I think a lot of other people,
21 will when they hear a song they don't like
22 they can change the station. It's not hard to

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1 do.

2 Q But just in this narrow example
3 where you go on the folk station in a DMCA
4 compliant market and assume you're going to
5 sit there and listen to it and you like James
6 Taylor and Carly Simon, that there's no
7 necessary expectation that you're going to
8 hear those in the two or three hours. On the
9 other hand in an on-demand situation, you
10 actually say I want James Taylor and Carly
11 Simon and if you don't get them, you're going
12 to be really disappointed. Isn't that fair?

13 Q I think it's close to fair. I
14 don't think it's exactly accurate. I think I
15 would be disappointed if I went to a station
16 that I expected to play James Taylor and after
17 two or three hours they didn't. I would be
18 disappointed and I would probably change the
19 station well before it reached that point.

20 But I think if the point you're
21 trying to make is that you have more control,
22 absolutely you have more control in on-demand

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1 but I don't think it's a complete dichotomy
2 the way you were setting it up.

3 Q And then getting back to where we
4 started, doesn't that more control make it
5 imperative that the webcasters in the on-
6 demand market have all four where in the DMCA
7 compliant market as you've said earlier they
8 might be able to get away with not having all
9 four?

10 A No. I mean it would help to
11 illustrate the point if you were aware that
12 there is on-demand webcasters that don't have
13 all four. My understanding is that the eMusic
14 is the second largest on-demand provider for
15 digital, for downloads, and they don't have
16 licenses with all four.

17 Q Any of the major webcasters that
18 we've been talking about in this proceeding,
19 Yahoo, AOL, Microsoft, in the on-demand have
20 less than all four?

21 A Those, no, not to my knowledge.
22 (Off the record discussion.)

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1 MR. SUGARMAN: Your Honors, this
2 would be, I have more, but this is a good time
3 to take a break if you're -- It is 12:30 p.m.
4 I understand that's normally the lunch hour.
5 So if you'd like to break for lunch, that
6 would be fine.

7 CHIEF JUDGE SLEDGE: Thank you.
8 We'll recess to 2:00 p.m. Off the record.

9 (Whereupon, at 12:31 p.m., the
10 above-entitled matter recessed to reconvene at
11 2:05 p.m. the same day.)

12 CHIEF JUDGE SLEDGE: On the
13 record. We'll come to order. Mr. Sugarman.

14 CROSS EXAMINATION (Cont'd.)

15 BY MR. SUGARMAN:

16 Q Dr. Brynjolfsson, on the bottom of
17 page 11 and going over to page 12 of your
18 report, you criticized Dr. Jaffe, do you not,
19 for not referring to or analyzing SESAC?
20 Correct?

21 A Well, I note that there are a
22 range of different values you can get

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1 depending on which of the PROs you look at
2 including SESAC.

3 Q You say, "Dr. Jaffe's analysis
4 ignores the only PRO that actually licenses
5 its catalog in the free market without a
6 consent decree limiting its activities and
7 then you go on to talk about SESAC. Correct?

8 A That's correct.

9 Q And I listened to your answer
10 before about SESAC and I think the record will
11 show that the first thing you said was "SESAC
12 negotiated" and then you changed and said,
13 "SESAC offered rates" and that's because
14 you're not familiar with the negotiation if
15 there was one between SESAC and the
16 webcasters, are you?

17 A Well, the evidence I have is the
18 agreement that they call their standard
19 agreement. That's what I have in terms of
20 what they may have negotiated.

21 Q And that's the published rates,
22 the standard rates. Correct?

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1 A That's correct.

2 Q So you didn't go behind that and
3 determine or try to determine whether AOL and
4 Yahoo and Microsoft actually went beyond the
5 published rates and negotiated something
6 different, did you?

7 A I don't know. I don't know if
8 they did.

9 Q So you don't know then that those
10 three have lump sum agreements at a lower rate
11 than the published rates. Right?

12 A I know that this is the standard
13 rate that SESAC offers, but I don't know what
14 other agreements may be that they may have
15 done.

16 Q Now you referred this morning to
17 SX Exhibit 207. Would you turn to that
18 please?

19 A The big one?

20 Q It's the big one. That's right.
21 And I'm assuming Dr. Brynjolfsson that you've
22 actually gone through this and studied it and

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1 analyzed it. Correct?

2 A I've looked at every page of it.

3 Q Okay. What is it?

4 A It's an Analyst Day Presentation
5 by Yahoo.

6 Q All right. And you know what
7 Analyst's Presentations are?

8 A The company is describing its
9 business to analysts and it's available to the
10 public.

11 Q Okay. Now would you look at page
12 27 and that's a depiction of the home pages of
13 Yahoo in '95, '99, 2005. Is that right?

14 A Apparently yes.

15 Q And as I look at it and correct me
16 if I'm wrong, music is mentioned once in each
17 home page, right, under Entertainment in the
18 first two, then, you know, a big list of areas
19 in the third? Right?

20 A Well, obviously the first two,
21 half of the pages are covered. So we don't
22 know. I can't tell from this looking what's

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1 under them. On the third one, the 2005 one,
2 yes, I do see it there in that box at the top.

3 Q Right. Okay, but I appreciate
4 your pointing out that half of them are
5 masked. But on that which you can see, you
6 would agree with me, would you not, that music
7 is, we won't infinitesimal, small part of the
8 offerings on the Yahoo home page?

9 A In the past years, in '95 and '99,
10 I think that's fair to say.

11 Q And you would not think it fair to
12 say with respect to 2005?

13 A Well, it's frankly a little hard
14 to read because even bottom of this page is
15 apparently cut off. I did visit the Yahoo
16 home page recently just to refresh my memory
17 and I remember noticing that music was
18 mentioned, I think, at least three times on
19 the current Yahoo home page quite prominently
20 I would say.

21 Q Can you recall whether music is
22 mentioned at all in any of the other 180 some

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1 odd pages of this Analyst Day Presentation?

2 A You know I looked at a lot of
3 Yahoo materials including PowerPoints like
4 this. I remember quite a bit of discussion of
5 music. I don't remember which pages it was
6 on.

7 MR. SUGARMAN: Your Honor, I move
8 to strike that as non-responsive. I asked him
9 about this particular document.

10 CHIEF JUDGE SLEDGE: Granted.

11 BY MR. SUGARMAN:

12 Q So my only question, Dr.
13 Brynjolfsson, is do you recall whether music
14 is mentioned on any one of the other 180 some
15 odd pages of SX 207?

16 A I can't recall specifically which
17 pages I saw music mentioned.

18 Q And as I understand your
19 testimony, you haven't done any studies or
20 analyses to quantify the spillover effect of
21 music and other features on the Yahoo website
22 or others. Is that right?

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1 A I'm not sure what you mean by
2 studies or analyses. I certainly have done a
3 great deal of research and teaching on the
4 spillovers, the importance of different types
5 of spillovers on portals, and I've certainly
6 read the documents that Yahoo and others
7 provided and in particular, I have in mind
8 some extensive presentations by Mr. Robert
9 Roback where he indicated that he thought that
10 spillovers were very important and that music
11 was an important part of Yahoo's overall
12 business strategy. But my question had the
13 word "quantify" in it and my question is have
14 you done any studies or analyses to quantify
15 the spillover effect whichever way it may
16 spill.

17 A To quantify it, I would have to
18 say no.

19 Q Now turning to promotion, I think
20 you indicated before that you agree with Dr.
21 Jaffe --

22 A Are we done with this exhibit?

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1 Q Yes. That you agree with Dr.
2 Jaffe that record companies have recognized
3 the promotional value on terrestrial radio.
4 Correct?

5 A For new art, I don't think you --
6 The full quote was specifically for new
7 artists and new albums as I recall. Is there
8 a particular place you're referring to?

9 Q Okay. If that's your
10 recollection, that's fine, new artists and new
11 albums and that's indeed the focus of your
12 testimony that promotional value is there for
13 new artists and new albums. Right?

14 A Yes, I would agree with that.

15 Q Okay, and but that you don't think
16 that there ought to be an adjustment because
17 it would be unfair to the labels that don't
18 get that benefit. Right?

19 A Well, I think my answer is more
20 complicated than that.

21 Q Isn't it that you have no way to
22 judge which labels will benefit from and which

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1 won't benefit from the promotional effect and
2 therefore there shouldn't be an adjustment to
3 a blanket license?

4 **A That's a portion of it. If you**
5 **would like, I would give the full answer, but**
6 **that's a piece of it.**

7 **Q** Well, you would at least agree
8 with that as far as it went.

9 **A That that's a portion of the**
10 **reasoning, yes.**

11 **Q** Okay. Now focusing in on the
12 benefit, you earlier testified I think with
13 respect to Table 1, page 7, the chart that Mr.
14 Smith put up that 50 percent of sales of
15 record companies in the last two years were of
16 current releases. Is that correct?

17 **A Yes, that's what the Figure 1**
18 **shows.**

19 **Q** Right, and those current releases
20 are the releases which get the sum of the
21 promotional benefit. Correct?

22 **A At least some of it.**

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1 **Q** Right.

2 **A I mean at some of -- Let me --**
3 **Actually that's a little backwards. At least**
4 **some of the promotional benefit -- At least**
5 **some of these releases get some of the**
6 **promotional benefit, yes. I wouldn't**
7 **necessarily think that all of them get**
8 **promotional benefits.**

9 **Q** So you're now trying to segment
10 among certain new artists and new releases
11 that do get and certain new artists and
12 releases that don't get promotional benefit.

13 **A Yes.**

14 **Q** Did you make that distinction in
15 your written testimony?

16 **A My point of the written testimony**
17 **was simply to note that there are some artists**
18 **now who get promotional benefit and other that**
19 **don't and in addition to the new artists and**
20 **new albums point, also down at the bottom it**
21 **noted, I quoted Mr. Jay Frank of Yahoo that**
22 **"two to three out of their 6,000 to 10,000**

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1 **songs received the additional promotion that**
2 **Yahoo claims increases sales."**

3 **Q** Okay, but my question is in your
4 written testimony you didn't make the
5 distinction that only some new artists and new
6 albums benefit as opposed to the blanket
7 statements which I think is what I see here
8 that new artists and new albums benefit from
9 promotion. Isn't that right?

10 **A Well, that statement is in quotes**
11 **is what Mr. Jaffe was saying and the following**
12 **sentence clarifies that there may be some**
13 **promotional effect for certain new and unknown**
14 **artists. I don't go on to say that I know**
15 **with any certainty that there is or that they**
16 **do get promotions or that they don't. My**
17 **point is much more general than that. It's**
18 **not really meant to be real specific about**
19 **exactly who gets it and who doesn't.**

20 **Q** And the reason that you can't be
21 more specific is that just as in the spillover
22 effect, you haven't done any analysis to

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1 quantify the effect of promotion or indeed
2 substitution for that matter. Correct?

3 **A That's correct. I'm not aware**
4 **that anybody has done such a study or that**
5 **anybody knows with any certainty.**

6 **Q** Right. Now are you saying that if
7 one album gets a promotional benefit which
8 results in somebody buying it that necessarily
9 that person won't buy an album that he or she
10 otherwise would have bought? Is it a "zero
11 sum game" to quote Judge Wisniewski?

12 **A I don't know if it's precisely a**
13 **zero sum game, but I know that in general when**
14 **retailers promote products, most of the effect**
15 **or often times the effect really just**
16 **redistributing around the consumer's wallet**
17 **from one product to another. I mean I can**
18 **think of -- I have a recollection that**
19 **Blockbuster promoted some movies at the**
20 **expense of other movies and there wasn't any**
21 **real net change in their overall sales. It**
22 **was just helping certain studios and hurting**

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1 other studios.

2 Q With respect to second albums, you
3 don't know based on any work that you've done
4 whether when a consumer as a result of a
5 promotion or as a result of hearing a song on
6 a webcast goes out and buys an album that that
7 person is not buying another album or whether
8 it's just incremental. You don't know one way
9 or the other. Isn't that fair?

10 A I don't know with certainty but I
11 think I know enough about how these businesses
12 work that I would be fairly confident that at
13 least a significant portion of it would come
14 at the expense of other artists and other
15 albums, but I have not quantified it.

16 Q And indeed you haven't actually
17 studied that phenomenon in connection with
18 your work in this case, have you?

19 A Well, I'm not exactly sure how to
20 interpret the word "study." I mean it's an
21 area of something I teach and do research on.
22 I'm familiar with the general way these

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1 promotions tend to work and I think I can
2 apply that expertise to this case.

3 Q But you didn't do anything
4 specifically with respect to this case to
5 validate or not validate your general overall
6 view based on your teaching and experience in
7 other areas. Is that right?

8 A I wouldn't -- I don't think so. I
9 don't think that's quite accurate. I mean I
10 really did try to make some effort to try to
11 see if we could quantify promotions and I read
12 a lot of the literature on this by other
13 academics on it and I was unable to identify
14 any specific research narrowly on this
15 question of promotion and substitutions.
16 There's sort of some near misses around the
17 general area having to -- and those were
18 consistent with my general understanding of
19 the way promotions and substitutions work, so
20 an overall picture that I feel comfortable
21 with.

22 Q Okay. Would you turn now to page

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1 42 of your written testimony? Actually it's
2 on page 43. It's part of the conclusion.
3 Midway down on the page you reaffirmed your
4 proposal of a flexible rate structure
5 including both revenue sharing and per
6 performance floor which "would offer improved
7 risk sharing compared to having just one of
8 its components?" Do you see that?

9 A Yes, I do.

10 Q Okay. So taking those two a per
11 performance floor would set a minimum or
12 protect the labels on the downside. Correct?

13 A Yes.

14 Q And at the other end of the
15 spectrum, a revenue share would allow the
16 labels to participate in the upside if the
17 webcasters happened to be successful.
18 Correct?

19 A Yes.

20 Q So the labels are protected on the
21 downside and share in the upside. Right?

22 A Yes.

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1 Q And to you that's improved risk
2 sharing?

3 A Yes, it is.

4 MR. SUGARMAN: I don't have
5 anything further.

6 CHIEF JUDGE SLEDGE: Before you
7 complete, Mr. Sugarman, I want to clarify a
8 question that Mr. Smith raised earlier. I
9 don't see that it affects your presentation at
10 all. That's the reason I've waited till this
11 point to address this. Mr. Smith asked if the
12 adoption of the regulations on procedure
13 affect the practice on the record of the
14 written statements and the record on exhibits.
15 With those procedures being implemented in the
16 middle of this proceeding, we will continue
17 throughout this proceeding with the practice
18 that exhibits that are not in the written
19 statement to be part of the record will have
20 to be offered and admitted and nothing
21 further. I want to be sure that that
22 statement does not indicate or establish any

1 rule or any clear interpretation of where our
 2 regs as amended identify and as we begin a new
 3 proceeding in our pretrial conference, these
 4 matters will be addressed.
 5 MR. SMITH: Thank you, Your Honor.
 6 MR. JOSEPH: Thank you, Your
 7 Honor.
 8 CHIEF JUDGE SLEDGE: Mr. Joseph.
 9 MR. JOSEPH: Thank you, Your
 10 Honors.
 11 CROSS EXAMINATION (Cont'd.)
 12 BY MR. JOSEPH:
 13 Q Good afternoon, Dr. Brynjolfsson.
 14 A **Good afternoon, Mr. Joseph.**
 15 Q And welcome back.
 16 A **Thank you. Go to see you.**
 17 Q It's probably not my place to do
 18 that. Dr. Brynjolfsson, on pages two and
 19 three of your written rebuttal testimony, is
 20 it correct to say you criticized Dr. Jaffe on
 21 the grounds that in your view his hypothesis
 22 relies or what you call his hypothesis relies

1 on a chain of mistaken assumptions and
 2 assertions?
 3 A **Yes, that's correct.**
 4 Q And one of the mistaken
 5 assumptions and assertions that you attribute
 6 to Dr. Jaffe on page three in 2D is that
 7 evidence of other benchmarks should be
 8 ignored. Is that an assertion or an
 9 assumption that you attribute to Dr. Jaffe?
 10 A **Two B.**
 11 Q Two D, Delta.
 12 A **Oh, 2D. Yes.**
 13 Q Now you don't cite any statements
 14 of Dr. Jaffe to that effect, do you, looking
 15 at the footnote or anywhere else in the
 16 testimony that you'd like?
 17 A **Well, what I -- To be clear what I**
 18 **cite is his ignoring of the other benchmarks.**
 19 Q But to be clear, my question was
 20 you don't cite any statements of Dr. Jaffe or
 21 there's no assertion if you will that evidence
 22 from other benchmarks should be ignored.

1 Correct?
 2 A **The way I read it is he made a**
 3 **decision to ignore and apparently used his**
 4 **expert judgment that that was the appropriate**
 5 **way to proceed and I inferred from that that**
 6 **he thought that that was the right thing to**
 7 **do.**
 8 MR. JOSEPH: Move to strike. I
 9 asked whether he quoted any assertions by Dr.
 10 Jaffe to that effect.
 11 CHIEF JUDGE SLEDGE: Denied.
 12 BY MR. JOSEPH:
 13 Q Well, in fact, Dr. Brynjolfsson,
 14 Dr. Jaffe never actually says that you should
 15 ignore other benchmarks, does he?
 16 A **He doesn't say it explicitly.**
 17 Q Thank you. Now in Footnote 6, is
 18 it correct that you identify the benchmarks
 19 that you criticize him for ignoring?
 20 A **Those are examples of benchmarks**
 21 **that I criticized him for ignoring.**
 22 Q Okay. You mention ring tones,

1 music videos, clip samples. You also mention
 2 historical agreements. To what historical
 3 agreements are you referring there?
 4 A **I'm trying to remember. I think I**
 5 **had in mind there the historical agreements**
 6 **that were made prior to the CARP.**
 7 Q Now I just asked you which
 8 benchmarks you believe Dr. Jaffe choose to
 9 ignore and you said the benchmarks identified
 10 in Footnote 6 are just examples. Do you
 11 remember when I asked you the same question at
 12 your deposition on November 3rd and I asked
 13 you what benchmarks do you believe he choose
 14 to ignore and you said ring tones, music
 15 videos and clip samples?
 16 A **That sounds consistent. I could**
 17 **check, but that sounds probably consistent.**
 18 MR. JOSEPH: Well, just so we can
 19 get this out of the way, why don't we hand out
 20 what we'll mark as Services Rebuttal Exhibit
 21 4 and I apologize, Your Honors, for actually
 22 burdening you with a second copy of the

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1 deposition, but the pagination of the copy
2 that Mr. Taylor handed out is different than
3 the one I have. It would slow things down
4 dramatically. Plus I believe you'll find the
5 one I'm handing out is probably easier to
6 read. So if I have your indulgence.

7 (Whereupon, the document
8 referred to was marked
9 as Services Rebuttal
10 Exhibit No. 4 for
11 identification.)

12 THE WITNESS: Any other
13 differences?

14 MR. JOSEPH: No. I believe that
15 the text is the same.

16 (Off the record discussion.)

17 THE WITNESS: Thank you.

18 By MR. JOSEPH:

19 Q I'd ask you, Dr. Brynjolfsson, to
20 turn to page 31 and you see on lines 14 to 17
21 I asked "What benchmarks you believe he chose
22 to ignore?" You said, "Ring tones, music

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1 videos and clip samples." Correct?

2 A Yes.

3 Q Okay. Now with respect to those
4 benchmarks as you refer to them you aren't
5 saying, are you, that those are markets that
6 you propose to use as benchmarks for the sound
7 recording performance right applicable to
8 webcasting, are they?

9 A Me. I didn't do a benchmark
10 analysis.

11 Q But you're actually saying Dr.
12 Jaffe -- You're not saying Dr. Jaffe ignored
13 these or you're not -- Let me rephrase the
14 question. You're not criticizing Dr. Jaffe
15 for ignoring these benchmarks as benchmarks
16 for the right that this court is charged with
17 evaluating, are you?

18 A I'm not entirely -- I think yes I
19 am criticizing him for ignoring them.

20 Q Are you saying that the license
21 fee applicable to sound recordings -- Well,
22 let me try to make this easier. Isn't what

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1 you are saying or what you are criticizing Dr.
2 Jaffe for is your belief that he should have
3 looked at these markets for information about
4 the relative value of sound recordings and
5 musical works?

6 A Not necessarily.

7 Q Let me again refer you to your
8 deposition. Do you remember when I asked you
9 the same question, "Are you saying Dr. Jaffe
10 should have used the price paid for the sound
11 recording performance right in clip samples as
12 a benchmark for the sound recording
13 performance right in webcasting" and you said,
14 "No, I'm saying that information from that
15 market may have provided information about the
16 relative value of sound recordings and musical
17 works." Correct?

18 A Yes.

19 Q And that's how you're criticizing
20 Dr. Jaffe for not using these markets to
21 provide information about the relative value
22 of sound recordings and musical works?

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1 A May I try and state what I had in
2 mind? I didn't do a benchmark analysis but it
3 seems to me that if you're going to do a
4 benchmark analysis it's incumbent on you to
5 look at the nearby relevant markets and
6 understand if there are some that are
7 particularly appropriate and from where I sit,
8 it appeared that looking at actual sound
9 recording that were sold to actual buyers and
10 sellers would be a good place to start.

11 Now it may be that after you
12 analyze each of these markets in turn that you
13 can find strengths and weaknesses of them that
14 would lead you to put more weight on some
15 versus others. I didn't see that Dr. Jaffe
16 did anything like that and that concerned me.

17 Q It's true, is it not, that you
18 criticized Dr. Jaffe for ignoring these
19 markets? Correct?

20 A Yes.

21 Q Your belief is that he ignored
22 these markets.

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1 **A That's what he appears to have**
2 **done. Yes.**

3 **Q And it's also true, is it not,**
4 **that you're criticizing Dr. Jaffe for ignoring**
5 **these markets without yourself having analyzed**
6 **any of these markets?**

7 **A That's correct.**

8 **Q Now you would agree, would you**
9 **not, that before you decided to rely on a**
10 **particular market or markets to be a benchmark**
11 **for comparison of the relative value of**
12 **musical works licenses and sound recording**
13 **licenses you would want to understand whether**
14 **the musical works and the sound recording**
15 **rights were licensed under the same market**
16 **structure and the same regulatory rules,**
17 **wouldn't you?**

18 **A Yes, I think that would be an**
19 **important factor to consider.**

20 **Q And you would agree, would you**
21 **not, that it would be relevant to your**
22 **assessment of the validity of a benchmark**

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1 **market for comparing the relative value of**
2 **sound recording rights to musical work rights**
3 **if one of the works, either the sound**
4 **recording right or the musical work right, was**
5 **subject to a compulsory license that the other**
6 **was not?**

7 **A Yes, I think that would be a**
8 **factor.**

9 **Q And you would also agree, would**
10 **you not, that it would be relevant to your**
11 **assessment of the validity of a benchmark**
12 **market for comparing the relative value of**
13 **sound recording copyright rights and musical**
14 **work copyright rights if one of the two types**
15 **of work, either the sound recording or the**
16 **musical work, was subject to an antitrust**
17 **consent decree or other court order that**
18 **regulated pricing but the other was not?**

19 **A Yes, I think that would be**
20 **relevant.**

21 **Q In fact, wasn't that one of your**
22 **criticisms earlier today of Dr. Jaffe's use of**

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1 the musical work benchmarks because ASCAP and
2 BMI are subject to a consent decree?

3 **A That was one of my concerns.**

4 **Q By the way, if you wanted to use a**
5 **market as a benchmark for comparing the**
6 **relative value of musical work rights and**
7 **sound recording rights, you would want a**
8 **market in which both the musical work right**
9 **and the sound recording right was licensed,**
10 **wouldn't you?**

11 **A Yes, I would think so.**

12 **Q And indeed, Dr. Brynjolfsson, in**
13 **Footnote 6, you characterize the markets**
14 **you've identified as benchmark markets where**
15 **sound recording are sold. Correct?**

16 **A Yes.**

17 **Q So it's your understanding that**
18 **sound recording rights are sold and/or**
19 **licensed in each of the markets you've**
20 **identified. Correct?**

21 **A Yes, I believe so.**

22 **Q Now just to be sure we're speaking**

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1 the same language, Dr. Brynjolfsson, are you
2 aware that a copyright and a sound recording
3 is actually made up of several different
4 rights?

5 **A I think there are several**
6 **different types of copyrights, yes.**

7 **Q But are you aware that a copyright**
8 **in a sound recording includes several**
9 **different rights?**

10 **A Yes, that's my understanding.**

11 **Q That's your understanding. Can**
12 **you name any of those rights?**

13 **A There's a digital performance**
14 **right. There's a femoral right. I think**
15 **there may be some kind of a recording right as**
16 **well.**

17 **Q Have you studied these since your**
18 **deposition?**

19 **A Not really. I mean I've read a**
20 **lot of documents about them. I wouldn't say**
21 **necessarily I've studied.**

22 **Q Did you discuss what rights might**

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1 make up the copyright and the sound recording
2 with counsel for Sound Exchange?

3 **A To some extent, I think I did.**

4 **Q** Do you remember at your deposition
5 when I asked you the question you said you
6 didn't know the exact name of any of the
7 rights?

8 **A Yes.**

9 **Q** Now let's talk about one of the
10 markets you fault Dr. Jaffe for not
11 considering, the ring tone market. When you
12 criticized Dr. Jaffe for not considering the
13 ring tone market in your written rebuttal
14 testimony, did you know which of the many
15 rights in a sound recording copyright that the
16 record company licenses when they grant
17 licenses to services to sell ring tones?

18 **A Not specifically, no.**

19 **Q** And when you criticized Dr. Jaffe
20 in your written rebuttal testimony, did you
21 know which of the many rights in a musical
22 work copyright that is or are licensed by

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1 of the many rights that are part of a
2 copyright in a musical work are licensed by
3 musical work copyright owners when they grant
4 licenses to sell ring tones.

5 **A I just know generally that the**
6 **owners of the musical work copyrights had have**
7 **some rights and I don't know specifically**
8 **which ones would be licensed in this case.**
9 **But also I think there may be some slight**
10 **misunderstanding. I wasn't listing these**
11 **particular examples as benchmarks for musical**
12 **works per se. I believe that the record shows**
13 **that the question is whether there are other**
14 **benchmarks for sound recording that could be**
15 **used and these are other examples of**
16 **benchmarks that could be used for sound**
17 **recordings.**

18 **Q** It's your testimony, Dr.
19 Brynjolfsson, that you're criticizing Dr.
20 Jaffe for not considering these markets as
21 benchmarks for sound recording licenses as
22 opposed to not using these markets to assess

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1 musical work copyright owners when they grant
2 licenses to services to sell ring tones?

3 **A Not specifically.**

4 **Q** Did you know generally?

5 **A Yes.**

6 **Q** But did you generally know --
7 Which rights did you generally know were
8 licensed by musical work copyright owners in
9 the ring tone market?

10 **A Now I didn't study this market. I**
11 **didn't do a benchmark analysis. So my**
12 **understanding of the details may not be very**
13 **precise. But my understanding is that in the**
14 **ring tone market, what essentially happens, is**
15 **that the musical works get licensed to the**
16 **providers of sound records who would then in**
17 **turn license the sound recording for use in**
18 **ring tones.**

19 **Q** I'm sorry, Dr. Brynjolfsson, but
20 that wasn't my question.

21 **A Okay.**

22 **Q** My question was do you know which

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1 the relative value of sound recordings and
2 musical works.

3 **A Yes, I think maybe that was the**
4 **point of misunderstanding. I don't know if**
5 **this was sufficiently clear, but the point two**
6 **there, the bottom of page two, it's**
7 **criticizing. He says that musical works are**
8 **the most appropriate benchmark for sound**
9 **recordings and I'm suggesting that there are**
10 **other benchmarks that might be more**
11 **appropriate and he didn't seem to consider**
12 **those other ones. Personally, I think the**
13 **whole path of going down and trying to, you**
14 **know, this hypothesis that musical works**
15 **always have the same price as sound recordings**
16 **didn't make any sense to me and so I wouldn't**
17 **even go down that path and I was more**
18 **concerned that he didn't look at a lot of**
19 **other potential benchmarks that might be a**
20 **little closer to what we're trying to get at.**

21 **Q** So you're now telling me something
22 different than you told me at your deposition.

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1 Correct?

2 A I don't think so.

3 Q Well, again, please turn to page
4 31 of your deposition.

5 A Okay.

6 Q And I specifically asked whether
7 you were saying Dr. Jaffe should have used the
8 price paid for the sound recording performance
9 right. In this context, I was asking about
10 clip samples.

11 MR. SMITH: Could we get a line?

12 MR. JOSEPH: I'm sorry. It was
13 line 24 of page 31.

14 BY MR. JOSEPH:

15 Q "As a benchmark for the sound
16 recording right and clip samples as a
17 benchmark for the sound recording performance
18 right in webcasting," I believe the word "and"
19 is a typo, and you said, "No, I'm saying that
20 information from that market would provide,
21 may have provided information about the
22 relative value of sound recording and musical

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1 works." Is that what you told me on November
2 3rd?

3 A Yes, I don't think that was as
4 precise an answer as it should have been.
5 Really the emphasis, what I was thinking about
6 in answering that question there, was I was
7 really responding to the words "that it should
8 be the price paid" and my emphasis would have
9 been on "relative value of sound recordings"
10 not that it would have been a specific "price
11 paid." And so I was simply trying to be more
12 general about what it was being used as. But,
13 yes, I don't think I meant it to limit it just
14 to that one comparison recordings and musical
15 works.

16 Q You said "relative value of sound
17 recordings." Relative value of sound
18 recordings compared to what if not musical
19 works?

20 A To each other.

21 Q Dr. Brynjolfsson, let's just see
22 whether that really was -- whether there was

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1 really a misunderstanding on November 3rd.

2 Take a look at Line 25 on page 32 and I asked
3 "And in this context, you're faulting Dr.
4 Jaffe for not using evidence of other
5 benchmarks for ring tones, music videos and
6 clip samples for what purpose?" And you said,
7 "I didn't study all the potential benchmarks
8 in detail, but I'm noting that Dr. Jaffe's
9 argument picks one which strikes me as fairly
10 far afield from a much larger set of potential
11 benchmarks and I found I was not convinced
12 that the other benchmarks should be ignored."
13 Which benchmarks were you referring to when
14 you say "Dr. Jaffe's argument picks one"?

15 A Well he really relies on it for
16 several parts of his argument. One is he's
17 trying to set up a benchmark for sound
18 recordings. Namely, musical works is a
19 benchmark for sound recordings and then he
20 also tries to come up with some benchmarks
21 that tell you what the relative value between
22 the two different ones should be. So it's

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1 kind of a chain of inferences that he's making
2 and along the way there are a number of
3 judgments he's making that I wasn't convinced
4 that that was the most straightforward or the
5 best way to do this kind of a benchmark
6 analysis.

7 Q So let me just ask straight out.
8 Are you criticizing Dr. Jaffe for not
9 considering the ring tone market, the music
10 video market or the clip sample market to
11 assess the relative value of licenses for
12 sound recordings and licenses for musical
13 works.

14 A I would say that, yes, I'm
15 criticizing him for that as well as for not
16 using them just directly.

17 Q So now I'm back to where I started
18 asking you about your criticism of Dr. Jaffe
19 for not using them to assess the relative
20 value.

21 A All right.

22 Q Which was what you first, I think,

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1 just told me was not what you were doing.

2 **A I don't think it was the focus of**
3 **what I was doing but it's also true.**

4 Q Dr. Brynjolfsson, are any of the
5 rights licensed by sound recording copyright
6 owners in connection with ring tones subject
7 to a compulsory license if you know?

8 **A Not to my knowledge, no.**

9 Q Are any of the rights licensed by
10 musical work copyright owners in connection
11 with ring tones subject to a compulsory
12 license if you know?

13 **A I don't know.**

14 Q Now I asked you which of the many
15 rights in the musical work right are licensed
16 by the musical right copyright owners. To the
17 extent you're criticizing Dr. Jaffe for not
18 considering the sound recording fees
19 applicable to ring tones directly as a
20 benchmark, can you tell me which of the many
21 rights in a sound recording copyright are
22 licensed by sound recording copyright owners

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1 when they grant licenses to services to sell
2 ring tones?

3 **A I don't know specifically which**
4 **ones, no.**

5 Q Do you know generally which ones?

6 **A I believe that the owners of the**
7 **copyright have the ability to prevent the**
8 **licensors of those sound recordings from using**
9 **them without their permission and therefore**
10 **they are in a position to charge for them.**

11 Q And that's all you know?

12 **A That's pretty much all I need to**
13 **know.**

14 Q Let's talk about another of the
15 markets that you fault Dr. Jaffe for not
16 considering, music videos.

17 **A Yes.**

18 Q Which of the many rights in a
19 sound recording copyright do the sound
20 recording copyright owners license when they
21 grant licenses to services in the music video
22 market that you believe Dr. Jaffe should have

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1 considered?

2 **A I don't know the specific rights.**

3 Q Do you know generally -- Oh, you
4 don't know the specific rights. I'm sorry.
5 I won't ask the next question then. Do you
6 know whether any right that license subject to
7 a compulsory license?

8 **A For music videos?**

9 Q Yes. For sound recordings and
10 music videos.

11 **A I don't believe it is but at one**
12 **moment I looked at all of this and I can't**
13 **remember right now which were and which**
14 **weren't. It wasn't what I wrote my report**
15 **based on.**

16 Q Would it also be true that you
17 don't know which specific rights in a musical
18 work are licensed by musical work copyright
19 owners in connection with music videos in the
20 market that you fault Dr. Jaffe for not
21 considering?

22 **A You know I don't know the exact**

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1 **name for the rights. No.**

2 Q Do you know whether the rights are
3 subject to a compulsory license?

4 **A I can't recall for sure.**

5 Q Do you know whether the rights are
6 regulated by an antitrust consent decree?

7 **A I'm not sure what the boundaries**
8 **of that consent decree are.**

9 Q Let's talk a little bit about
10 master use and synch licenses which is the
11 market Dr. Jaffe did use to explore the
12 relationship between sound recording rights
13 and musical work rights and I believe if you
14 turn to page 13 of your written rebuttal
15 testimony. Let me direct your attention to
16 the second paragraph which just as a matter of
17 spacing happens to be labeled first.

18 **A Right.**

19 Q Would it be correct to say that
20 your point in this paragraph is that while a
21 webcaster needs rights from all four major
22 record companies, the film maker does not have

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1 that need and as a result the record company's
2 market power would be "greatly diminished" in
3 dealing with the film producer?

4 **A No, that would not be correct.**

5 **Q** If I change the webcaster's need
6 to the webcaster's strong initiative, would it
7 be correct?

8 **A There are really two points here**
9 **that are closely related. Let me just look at**
10 **this again. One is the point about the**
11 **blanket license versus the individual song**
12 **recording and the second one is the all four**
13 **major record companies. So that's the point**
14 **there.**

15 **Q** Let's explore that. You are
16 referring to the blanket license against the
17 not needing a blanket license in this
18 paragraph as a reason that the film producer
19 doesn't need to deal with all four major
20 record companies. Isn't that what you're
21 trying to say here?

22 **A I think that's part of it. I**

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1 **really think there are both those points in**
2 **there. I guess it's not distinguished as well**
3 **in the writing as what I had in mind in my**
4 **mind. But I think both of those points are**
5 **important.**

6 **Q** Okay. Now just in terms of the
7 writing also, let me make sure I'm
8 understanding what you're saying.

9 **A Yes.**

10 **Q** You referred to the webcaster
11 having a strong incentive but a film maker
12 having "no corresponding need" and you use the
13 word "corresponding." Are you corresponding
14 or equating in some sense the strong incentive
15 with the need that you refer to in the second
16 sentence?

17 **A It should probably read**
18 **"corresponding incentive to be parallel."**

19 **Q** But when you wrote it you called
20 what the film maker no need. Correct. Not a
21 corresponding need.

22 **A Right. That they had no need to**

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1 **do that. Correct.**

2 **Q** Now you used the term "market
3 power" in that paragraph. Do you see it?

4 **A Yes.**

5 **Q** "That would greatly diminish each
6 record company's market power."

7 **A Yes.**

8 **Q** Is that the same thing in your
9 terminology as bargaining power in this
10 context?

11 **A Yes, in this context it is. I**
12 **probably should have used the words**
13 **"bargaining power" there.**

14 **Q** But you used the terms "market
15 power."

16 **A Yes, I did, but I mean it as you**
17 **know more or less the same. Power in the**
18 **market.**

19 **Q** Now is one of the points you're
20 trying to make in this paragraph labeled
21 "First" essentially that in the market for
22 master use rights in films the recordings of

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1 different record companies are substitutes for
2 each other?

3 **A To some extent, yes.**

4 **Q** And you would agree, would you
5 not, that all else equal as a general rule the
6 more substitutes there are for a product to
7 sell or reselling the less bargaining power or
8 market power that seller will have? Correct?

9 **A Exactly. I think that's the**
10 **essence of a key point to that paragraph.**

11 **Q** Now in the paragraph labeled
12 "Second" which happens to be the third
13 paragraph on the page, you talk about the
14 possibility that a film producer might employ
15 a cover band. Do you see that?

16 **A Yes.**

17 **Q** You haven't done any analysis of
18 how frequently that occurs in the master use
19 and the synch markets, have you?

20 **A All I need to know in terms of how**
21 **frequency occurs is that it could occur and so**
22 **therefore the fact that it could happen at**

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1 **all, that's sufficient.**

2 MR. JOSEPH: I'll move to strike
3 that as non-responsive. I asked him if he's
4 done any analysis and he told me what he
5 needed to know.

6 CHIEF JUDGE SLEDGE: Overruled.

7 BY MR. JOSEPH:

8 Q Let me ask you to look at page 103
9 of your deposition which is Services Rebuttal
10 4.

11 A **Oh the deposition --**

12 Q Okay. No, but we unfortunately
13 talked about it much.

14 A **Yes we did.**

15 Q And just look right up there at
16 Line 3. "Have you done any analysis of how
17 frequently that occurs in the master use and
18 synch markets?" I asked you that question
19 back on November 3rd.

20 A **Right.**

21 Q And the answer you gave me then
22 was "No, I have not" and that was a true

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1 statement then?

2 A **I think when you say the word**
3 **"analysis" I interpret that as (Inaudible.)O**
4 **counting or quantifying. Yes, that would be**
5 **a true statement.**

6 Q And it's a true statement now.
7 Correct?

8 A **Interpreted that way, yes. I mean**
9 **when I look at the rest of the answer, if you**
10 **read further, it sort of says that same thing**
11 **as I just said.**

12 MR. JOSEPH: There was no question
13 pending, Your Honor. I move to strike the
14 last comment.

15 CHIEF JUDGE SLEDGE: Denied. That
16 was an extension of the answer he was giving.

17 BY MR. JOSEPH:

18 Q No, Dr. Brynjolfsson, in
19 construing the question back on November 3rd,
20 you took "analysis" to mean "quantitative
21 analysis" I think you just said. Correct?

22 A **Yes, that's correct.**

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1 Q And you haven't done any
2 quantitative analysis of the effect on prices
3 of the master use market of the possibility
4 that a producer might use a cover band, have
5 you?

6 A **Well, I think at this point we be**
7 **precise here. So if you mean by quantitative**
8 **getting down to specific decimal points or so**
9 **forth, certainly not. If by quantitative you**
10 **mean positive or negative, then I would have**
11 **to say yes, it's straightforward to analyze**
12 **that the effect would be that it would lead to**
13 **a lower price.**

14 Q Have you attempted the quantify
15 the amount of the effect?

16 A **Only its sign and actually to**
17 **elaborate, I mean its sign and I think I can**
18 **say with confidence that it's nontrivial. I**
19 **don't mean to say that it's infinitesimal.**

20 Q Is there any aspect of that
21 analysis, Dr. Brynjolfsson, beyond what you
22 describe in your written rebuttal testimony on

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1 pages 13, 14 and 15 and here I'm looking for
2 yes or no whether there's any aspect beyond
3 what you describe in your written rebuttal
4 testimony.

5 A **Any aspect of what?**

6 Q The analysis that the effect of
7 the ability to use cover bands is nontrivial.

8 A **Right. The analysis stems from my**
9 **basic understanding of economics that when you**
10 **have a strong threat like a cover band, that's**
11 **going to fundamentally affect your bargaining**
12 **power. I think that's reflected in those**
13 **several pages that referred to but that's what**
14 **the analysis is.**

15 Q Now, Dr. Brynjolfsson, you say on
16 page 10 of your written rebuttal testimony
17 that if a benchmark based approach is to be
18 used, this is right at the very top of the
19 page, "then musical works licensing rates are
20 an appropriate benchmark." Do you see that?

21 A **Yes, I do.**

22 Q Just to be sure that we have a

1 common knowledge base, are you aware that in
2 the first proceeding to assess digital sound
3 recording performance fees a Librarian of
4 Congress looked to a musical work benchmark to
5 assess sound recording fees for the pre-
6 existing subscription services?

7 **A I don't recall that, no. In fact,**
8 **I thought there was some discussion of**
9 **actually dismissing that.**

10 **Q** So you didn't take that fact or
11 the fact that that may or may not have
12 happened into account when you criticized Dr.
13 Jaffe, did you?

14 **A No, I based it on the basic**
15 **economics.**

16 **Q** On page 11, you say in your words
17 that is "far from obvious," this is about five
18 lines down in the paragraph beginning "To
19 begin with," "that the standards applied by
20 rate court is the standards that should be
21 applied in this case." "By the rate court,"
22 you're referring to the ASCAP and/or the BMI

1 rate court?

2 **A That's correct.**

3 **Q** But your understanding of that
4 standard is limited to what I think you've
5 described as very general terms. Correct?

6 **A Yes, that's correct.**

7 **Q** You haven't looked at cases
8 defining the standard used in the rate court,
9 have you?

10 **A No, I have not.**

11 **Q** Earlier today, you said that
12 Congress has said that the price for musical
13 works and sound recordings should be separate,
14 I believe. Was that approximately what you
15 said earlier today?

16 **A I don't think that's exactly**
17 **right.**

18 **Q** Okay. Well, you refer, do you
19 not, on page 11 to 17 USC Section 114(I)? Do
20 you see that?

21 **A Yes, I do in Footnote 24. Right?**

22 **Q** Well, actually I'm looking at the

1 citation in the sentence.

2 **A Oh, right. Okay in the sentence.**
3 **Right.**

4 **Q** "Congress went out of its way to
5 make clear rate setting in this proceeding
6 cannot be used in any way and proceedings
7 before the rate court to set rates for the use
8 of musical works."

9 **A Yes, that's correct.**

10 **Q** You're not offering an opinion on
11 statutory construction to the Court here, are
12 you?

13 **A I don't even know what statutory**
14 **construction is. So I guess I'd have to say**
15 **yes.**

16 **Q** Are you offering any opinion to
17 the Court on the meaning or significance of
18 Section 114(I)?

19 **A I'm just taking it at its plain**
20 **language.**

21 **Q** And at its plain language it says
22 that the fees for sound recordings should not

1 be taken into account in setting the fees for
2 musical works. Correct?

3 **A That's correct.**

4 **Q** It doesn't say that the fees for
5 musical works should not be taken into account
6 in setting the fees for sound recordings, does
7 it?

8 **A No, it doesn't.**

9 **Q** By the way, you haven't done any
10 research as to why Subsection (I) of Section
11 114 -- Let me withdraw that. You haven't done
12 any research into why Subsection (I) is in
13 Section 114, have you?

14 **A No, I haven't.**

15 **Q** You haven't looked at any
16 committee reports, hearings, floor statement
17 or any other pieces of legislative history for
18 example, have you?

19 **A No, I haven't.**

20 **Q** So you're not aware that the
21 Registrar of Copyrights explained in a hearing
22 that that the section, that provision rather

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1 was included to alleviate the fear that
2 royalties going to musical works rights
3 holders might be decreased, are you?

4 **A That doesn't surprise me. It**
5 **seems sort of consistent with my**
6 **understanding.**

7 Q Let me ask you to turn to page 12,
8 sir. In the paragraph beginning "Second," you
9 say that --

10 **A It's the "Second" paragraph.**
11 **Right?**

12 Q It would be the first full
13 paragraph that we won't -- You say that -- Let
14 me see if I can find where it is. It's fairly
15 far down you say that in negotiating the deal
16 with the radio industry, "BMI likely cared
17 little about the breakdown between over the
18 air radio and simulcasting." Do you see that?

19 **A Yes.**

20 Q Okay. You didn't talk to anybody
21 at BMI about that, did you?

22 **A No, I did not.**

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1 Q And you didn't talk to any radio
2 broadcasters about what either the radio music
3 license even negotiated the deal on behalf of
4 radio broadcasters or BMI intended in the
5 negotiation of the streaming portion of that
6 agreement, did you?

7 **A No, I did not.**

8 Q A little later on or actually a
9 little above that you talk about an agreement
10 between radio broadcasters and ASCAP and again
11 you didn't talk to anyone at ASCAP or to any
12 radio broadcaster about what the parties
13 intended in that agreement, did you?

14 **A No, I did not.**

15 Q And now I note that you say the
16 simulcasters had an incentive to create a low
17 benchmark for use in this proceeding. In
18 fact, you don't know whether that happened, do
19 you?

20 **A I do know that they had an**
21 **incentive to create a low benchmark for this**
22 **proceeding.**

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1 Q You don't know whether in fact
2 they negotiated in such a way as to create a
3 low benchmark, do you?

4 **A Well, that's what I would expect**
5 **them to do. Economists believe that people**
6 **respond to incentives and I believe that they**
7 **would have responded to incentives.**

8 Q You don't have any actual facts
9 about what happened in that negotiation, Dr.
10 Brynjolfsson, do you?

11 **A I have the facts that there were**
12 **incentives for them to behave a certain way**
13 **and my personal belief is that people respond**
14 **to incentives generally.**

15 Q Let me ask you to turn to page 101
16 of your deposition please, Dr. Brynjolfsson.

17 **A Okay.**

18 Q On page -- Actually, let me first
19 ask you to turn to page 100. I ask you about
20 Line 9. On Line 9, I point out the language
21 we were just talking about and on Line 9 on
22 page 101, I ask whether you can point to any

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1 evidence to show that it in fact did happen
2 and your answer then was "I don't know whether
3 it happened." Would that be true? That was
4 true then when you gave it, wasn't it, that
5 answer?

6 **A Well, taking it in its full**
7 **context, I guess I just said to you more or**
8 **less what I just said to you. If you could**
9 **look up at page 100 on Lines 17 through 19, I**
10 **said I believe they have an incentive to do**
11 **and it wouldn't surprise me therefore if they**
12 **did so.**

13 Q Right.

14 **A But it's correct that I don't know**
15 **for sure what happened, but much of economics**
16 **is based on a belief that people respond to**
17 **incentives and we would have to throw out most**
18 **of the economics if you didn't grant that.**

19 Q But you can't in fact point to any
20 evidence to show that in fact they did do what
21 you say they have the incentive to do, can
22 you?

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1 A Well, as you already asked and
2 already answered, I said the evidence I have
3 is that I believe people respond to incentives
4 and they had incentives to do that.

5 Q And your answer on November 3rd was
6 "I don't know whether it happened." Correct?

7 A Not with any certainty.

8 Q And on November 3rd, you didn't add
9 that qualification, did you?

10 A No, I probably should add that to
11 some of my answers from time to time.
12 Probably.

13 Q Now a little earlier today, Dr.
14 Brynjolfsson, you discussed some costs with
15 Mr. Sugarman and you discussed their effect on
16 decision by rational decision makers. Do you
17 remember that from earlier today?

18 A Yes, I do.

19 Q And you said I believe that
20 "economists in evaluating how a rational
21 decision makers makes a decision believe that
22 the decision maker would ignore some cost."

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1 Right?

2 A "Should ignore some costs" is what
3 I said.

4 Q "Should ignore some costs." And
5 that's because economists believe that
6 rational decision makers evaluate a decision
7 to be made by weighing the costs and benefits
8 that are consequences of that decision.
9 Correct?

10 A Yes, that's correct.

11 Q Now let me ask you to turn to page
12 nine of your written rebuttal testimony.

13 A Yes.

14 Q In discussing Room Full of Views
15 and how, I'm sorry, Room Full of Blues and how
16 that example that you gave relates to music
17 creation by a record label, do you remember
18 discussing that earlier today?

19 A Yes, I do.

20 Q Do you remember testifying that
21 you believe that Sound Exchange would pay
22 Alligator Records and Alligator Records would

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1 then recoup what it was owed from its fronting
2 of expenses to Room Full of Blues and that's
3 how Alligator Records got involved in
4 benefitting from this payment?

5 A I think I was not quite as clear
6 as what you said. I think that we don't know
7 exactly for sure what they recouped or what
8 they didn't recoup, but that's a common way
9 for labels to behave with their bands.

10 Q And it's your testimony and your
11 understanding that that's a common way for
12 labels to behave with respect to the payments
13 made by Sound Exchange.

14 A I don't know for sure. I don't
15 know.

16 Q Let me ask you to turn please to
17 page 39 of your written rebuttal testimony
18 please and there you're discussing the willing
19 buyer/willing seller standard and the
20 paragraph marked third, and I'm not going to
21 count which paragraph that is, you say and I
22 quote "Congress could not have achieved the

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1 result of the statute by simply granting an
2 antitrust exemption to the record companies as
3 such an exemption likely would result in
4 monopolist pricing." Do you see that?

5 A Hm-hm.

6 CHIEF JUDGE SLEDGE: Is that a
7 yes?

8 THE WITNESS: Yes sir.

9 MR. JOSEPH: Thank you, sir.

10 BY MR. JOSEPH:

11 Q And by "monopolistic pricing," let
12 me just make sure I have the word right, by
13 "monopolistic pricing," you mean price set by
14 a single seller that was able to set take it
15 or leave it offers. Right?

16 A Yes, a monopoly.

17 Q So is it your testimony that the
18 statute as you understand it does not
19 contemplate the result of monopolistic
20 pricing?

21 A Not contemplate a single monopoly.
22 That's correct.

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1 Q But in your view, monopolistic
2 pricing is permissible?

3 A I would want to be precise and say
4 that it did not contemplate a single monopoly.
5 Economists sometimes refer to a concept of
6 monopoly power or monopolistic competition
7 which may involve more than one seller and so
8 I don't want to make unduly complicated by
9 using that word.

10 Q But it is your testimony that as
11 you understand it the statute doesn't
12 contemplate the result of pricing by a single
13 seller that was a monopoly. Correct?

14 A Yes, that's correct.

15 Q Now, Dr. Brynjolfsson, you are
16 aware, are you not, that the Librarian of
17 Congress has described the relevant
18 hypothetical market price that this Court is
19 charged with setting as the price that would
20 be agreed by most willing buyers and most
21 willing sellers in a competitive marketplace.
22 You're aware of that. Correct?

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1 A I remember that, yes.

2 Q And you would agree, would you
3 not, that for a marketplace to be competitive
4 products sold by the sellers must be at least
5 partial substitutes for each other?

6 A Yes.

7 Q And "by partial substitutes" you
8 mean that the availability of one product
9 affects or constrains the pricing power of the
10 seller of the other product. Correct?

11 A The availability or the quantity
12 sold of one product would affect the pricing
13 power of other products.

14 Q Now you said in response to a
15 question by Mr. Smith earlier today that you
16 believed the hypothetical market with four
17 major labels licensing webcasters would be
18 competitive. Just a very simple question, can
19 you point me to where in your written rebuttal
20 testimony you've reached that conclusion?

21 A I was describing a spectrum
22 between monopoly and perfect competition and

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1 different degrees of competition between that.
2 So pointing specifically to the paragraph
3 labeled "Second," I was saying that there's no
4 -- Dr. Jaffe seems to imply false dichotomy
5 between monopoly and perfect competition and
6 what I would suggest is that there's ground in
7 between those.

8 Q And I'm asking you a different
9 question.

10 A Okay.

11 Q I'm asking you where in your
12 written rebuttal testimony, sir, do you reach
13 the conclusion that the hypothetical market
14 with four major record companies licensing
15 webcasters would in fact be competitive or
16 don't you reach that conclusion?

17 A No, I reached it right where I
18 pointed that at one end is a monopoly with no
19 competition and at the other end is perfect
20 competition. So if it's not a monopoly, then
21 it does have some competition.

22 Q But the only thing you're

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1 referring to is this paragraph.

2 A Well, I think it's sort of the
3 general argument there. I mean I could look
4 through, but I think that paragraph is
5 sufficient.

6 Q Now have you performed --

7 A I mean for what it's worth the
8 next paragraph also says that it's not -- I
9 don't think a single monopoly would be
10 appropriate. It should be that willing buyers
11 and sellers would not be the same as a
12 monopoly. In other words, it would be
13 competition. That's the paragraph starting
14 with "Third."

15 Q Okay. Let me try to ask a yes/no
16 question and if you can't give me a yes/no
17 answer, just tell me that you can't give me a
18 yes/no answer please.

19 A All right.

20 Q Have you performed an analysis of
21 the level of competition that exists in any
22 market for the licensing of sound recordings?

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1 A I'm not sure I can give you a
2 yes/no answer to that one.

3 Q Can you point to anything in your
4 written rebuttal testimony that describes any
5 analysis of the level of competition that
6 exists in any market for the licensing of
7 sound recording?

8 A Well, one place -- Could you ask
9 the question again? I just want to make sure
10 I'm answering precisely.

11 MR. JOSEPH: Actually, may I ask
12 for that to be read back? Is that difficult
13 to do?

14 CHIEF JUDGE SLEDGE: That's -- Why
15 don't you rephrase it?

16 BY MR. JOSEPH:

17 Q Dr. Brynjolfsson --

18 A It's hard to remember, isn't it?

19 Q -- can you point to anything in
20 your written rebuttal testimony that discusses
21 an analysis of the level of competition that
22 exists in any market for the licensing of

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1 sound recordings?

2 A Yes.

3 Q And what can you point to, sir?

4 A So when I came up with this 75/25
5 percent division of surplus, that reflected my
6 assessment of the level of competition in that
7 marketplace.

8 Q That's the result of -- And that's
9 -- I'm sorry. Let me withdraw that. And
10 that's referring to something you did in
11 connection with your written direct statement.

12 A I think yes. It was primarily
13 there. I mean there's a smidgen of it in here
14 when I talk about monopoly at one end being
15 100 percent or close to 100 percent, perfect
16 competition, stripping it of all power which
17 is, I guess, in that paragraph labeled
18 "Fourth" where it would be close to zero
19 percent, so you can get a sense of the
20 different levels of competition and some of
21 the different values that you would get in
22 each of them. As you note, I discuss this and

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1 analyze it in more detail in the direct.

2 Q You mentioned earlier that the
3 record companies could compete in the
4 licensing of webcasters, I believe, and
5 correct me if I have this wrong by competing
6 for market share, if you will. Do you
7 remember that discussion?

8 A I think so. Yes. It actually
9 reflects my belief, so I may have said that
10 some time today.

11 Q Are you positing that such
12 competition would take the form of price
13 competition?

14 A It could, yes.

15 Q And if it were to take the form
16 price competition, are you positing direct
17 dealing between the record companies and the
18 webcasters over the price of the sound
19 recording performance license for market
20 share?

21 A Well, my understanding is there is
22 a statutory rate in place now, so they don't

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1 have the discretion to do that. But in a
2 hypothetical marketplace, yes, I would imagine
3 that would be the way they could do that.

4 Q And I believe you mentioned eMusic
5 earlier today as an example of an interactive
6 webcaster that operates without licenses from
7 all four major record companies.

8 A No, I believe I said download
9 service.

10 Q So it's not an interactive
11 webcaster.

12 A I don't know for sure all of the
13 services that they provide. I know that
14 they're constantly changing and if we check it
15 today, it might be different than what they
16 were doing yesterday.

17 Q But your understanding is actually
18 that it's a service that provides permanent
19 downloads. Correct?

20 A I think that's the primary
21 purpose.

22 Q And in fact, it bills itself

Page 205

1 specifically as a service that provides
2 downloads of music from independent record
3 labels, doesn't it?

4 **A Exactly.**

5 **Q** And what it charges is I think \$10
6 for 30 downloads. Is that correct? Thirty
7 permanent downloads.

8 **A I think it was in that range.**

9 **Yes, I remember it was less than what you get**
10 **for the sound recordings from the majors.**

11 **Q** So it's not an interactive
12 webcasters in any sense of the word as far as
13 you know as you sit here today. Is that
14 correct?

15 **A Yes, I don't know.**

16 **Q** Let's turn please to page 37 of
17 your written rebuttal testimony. You have a
18 heading that says "For most music webcasting,
19 substitutional effects may outweigh any
20 promotional effects." Do you see that?

21 **A Yes, it's the middle of that**
22 **heading. Right.**

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1 **Q** Now I'm saying "may." It's true,
2 is it not, that you haven't undertaken any
3 analysis to attempt to quantify the
4 promotional or substitutional effect of
5 webcasting?

6 **A Didn't we already discuss this?**
7 **Yes, that's correct.**

8 **Q** Well, if we did, I apologize. And
9 on page 37, I think people have been sniffing
10 around this quote, but I just want to make
11 sure it's absolutely clear. You quote Dr.
12 Jaffe as saying that "record companies have
13 long recognized the promotional value inherent
14 in traditional, over the air radio play and
15 have worked with terrestrial radio stations to
16 promote new artists and new albums." Do you
17 see that?

18 **A Yes, I do.**

19 **Q** And you agree with that statement.
20 Correct?

21 **A I agree that large scaled**
22 **promotional campaigns for relatively new and**

Page 207

1 **unknown artists may be webcasting one**
2 **component.**

3 **Q** Yes or no, sir. Do you agree with
4 that statement?

5 **A I agree with the portion that I**
6 **just stated.**

7 **Q** I ask you to turn -- Well, do you
8 remember that I asked you that exact question?
9 I'm sorry. It may have been Mr. Sugarman who
10 asked you that exact question during your
11 deposition.

12 **A No, I don't remember that.**

13 **Q** You don't remember that? Turn to
14 page 121 and look at Line 24 of your
15 deposition.

16 **A Okay.**

17 **Q** And you say -- There's a question.
18 You quote Dr. Jaffe and it's quoted exactly
19 the way I just quoted.

20 **A Right.**

21 **Q** And the question was "Do you agree
22 with that statement" and your answer was "Yes,

Page 208

1 I do." Did you give that testimony on
2 November 3rd?

3 **A Apparently yes.**

4 **Q** Now in the next sentence after Dr.
5 Jaffe's quote -- I'm sorry. It's two
6 sentences after Dr. Jaffe's quote. You refer
7 to "music that is known and sought out by
8 listeners." Do you see that?

9 **A Yes.**

10 **Q** And "one way that music becomes
11 known and sought out by listeners is through
12 radio air play." Isn't that correct?

13 **A Yes, that's one way.**

14 **Q** Now at the bottom of that page in
15 the bottom paragraph, you say -- In fact, it's
16 shortly. It's in the same sentence we were
17 just reading. "It is much easier for these
18 listeners to locate and capture the music
19 sought compared to over the air radio." Now
20 by "locating and capturing" you were actually
21 referring to locating and listening to
22 specific types of music. Correct?

Page 209

1 **A** **Yes, I think that's what I had in**
2 **mind.**

3 **Q** You weren't talking about any
4 concept of stream ripping or copying, were
5 you?

6 **A** **You know that's not really the way**
7 **I was thinking about that paragraph. I**
8 **remember when you pointed that out to me**
9 **earlier, the word "capture," I think I really**
10 **meant just listen to.**

11 **Q** Now in the first two full
12 paragraphs of page 38, would it be correct to
13 say that you argue that rather than adjusting
14 the fee for the statutory license in this
15 proceeding to account for promotional value,
16 the courts should allow the market to deal
17 with the issue by allowing the record
18 companies and webcasters to negotiate outside
19 of the statutory rate?

20 **A** **Yes, I think that's fair.**

21 **Q** And you testified earlier, I
22 believe, that this could be done by direct

Page 210

1 deals on discounts, T-shirts or other
2 consideration to the webcasters.

3 **A** **Yes.**

4 **Q** And just so we all understand what
5 you mean, let me ask you to focus on
6 simulcaster of terrestrial radio air play and
7 further to assume --

8 **A** **Terrestrial radio air play.**

9 **Q** Simulcasts of terrestrial radio
10 air play.

11 **A** **Oh, simulcasts of it. All right.**

12 **Q** Yes.

13 **A** **All right.**

14 **Q** And further to ask you to assume
15 that terrestrial radio air play is promotional
16 and that listener for listener a simulcast of
17 the terrestrial broadcast is equally
18 promotional. That's the assumption I'd like
19 you to consider and where I would like you to
20 focus. I just want to understand what you're
21 saying about the market here. Are you
22 suggesting that instead of adjusting the

Page 211

1 statutory fee for simulcasting the court
2 should leave it to the record companies and
3 simulcasters to negotiate over discounts or
4 other consideration for playing the recordings
5 that the record companies want to promote?

6 **A** **I think it would in general be**
7 **more complicated. My sense is that from what**
8 **I've read and from what I've heard that the**
9 **promotion campaigns tend to be much more**
10 **sophisticated than that. So there would**
11 **probably be a whole package that they would do**
12 **in terms of artists appearing on the station**
13 **and promotions and billboards and T-shirts and**
14 **there would be whole package and part of the**
15 **bundle would be potentially discounts on the**
16 **royalties for stations that participated in**
17 **the promotion.**

18 **Q** Okay. Dr. Brynjolfsson, you're
19 fighting my hypothetical and you're not
20 assuming what I've asked you to assume. Now
21 you may disagree with the premise. I think
22 you've just expressed that, but assuming that

Page 212

1 terrestrial radio air play itself is
2 promotional.

3 **A** **Yes.**

4 **Q** And that listener for listener,
5 the simulcast is equally promotional. Are you
6 suggesting that instead of adjusting the
7 license fee for simulcasting, this court
8 should leave it to record companies and
9 simulcasters to negotiate over discounts and
10 other consideration to play the recordings
11 that the record companies want to promote?

12 **A** **Emphasis on other. I think that**
13 **the discounts I suspect would probably be part**
14 **of a much broader package, but the essence of**
15 **your question is that, yes, I would leave it**
16 **to people who are experts to figure out how to**
17 **do promotions to figure out what the right**
18 **package of consideration might be. It might**
19 **include discounts. It might not include**
20 **discounts. It might include other things.**

21 **Q** And have you examined the law to
22 determine whether such discounts or other

Page 213

1 consideration would be lawful if paid by the
2 record company to a simulcasters?

3 MR. SMITH: Objection, Your Honor.
4 Calls for him to opine on a legal issues that
5 he hasn't given any opinion on.

6 CHIEF JUDGE SLEDGE: I will
7 overrule that in light of his testimony which
8 included many legal opinions. I'm not --
9 Overruled.

10 THE WITNESS: So what is the
11 precise question?

12 BY MR. JOSEPH:

13 Q Have you examined the law? I'm
14 actually not asking your opinion of the law.
15 I'm just asking whether you looked at it to
16 account, I'm sorry, to determine whether such
17 discounts or other consideration you've just
18 described would be lawful?

19 A **I don't know for sure. I think**
20 **the complexity has to do with the over the air**
21 **part which I think there are some laws about.**
22 **I think that there is more flexibility for**

Page 214

1 webcasting, but I haven't read all the
2 relevant statutes in order to know exactly
3 what part would be permissible and what part
4 wouldn't be. I would certainly hope that any
5 promotion would be done within the bounds of
6 the law in that respect. I'll put it that
7 way.

8 Q Professor Brynjolfsson, on page
9 four of your written rebuttal testimony.

10 A Yes.

11 Q In the first paragraph.

12 A Yes.

13 Q You discuss two approaches to
14 estimating the value of sound recordings using
15 benchmarks and analyzing underlying costs and
16 benefits. Do you see that?

17 A Yes, I do.

18 Q And you say that each has
19 advantages and weaknesses. Right?

20 A Yes.

21 Q And you would agree, would you
22 not, that a weakness of the underlying costs

Page 215

1 and benefits approach is that some data are
2 unavailable or otherwise available only
3 imprecisely?

4 A **Yes, I think that's fair to say.**

5 Q And the imprecision includes
6 uncertainty inherent in projecting future
7 costs and benefits. Correct?

8 A Yes.

9 Q Now your model relies on
10 projections of webcasting advertising prices,
11 doesn't it?

12 A **In part, yes.**

13 Q Let's look briefly at the history
14 of those prices. You would agree, would you
15 not, that from 1996 to 2000 internet
16 advertising prices were rising significantly?

17 A **By and large, yes.**

18 Q Then in 2000 and 2001, internet
19 advertising prices dropped significantly,
20 didn't they?

21 A **I believe they did.**

22 Q And it would be fair to say that a

Page 216

1 lot of people didn't expect internet
2 advertising prices to drop significantly in
3 2000 and 2001, did they?

4 A **Some people didn't. Some people**
5 **did.**

6 Q And in fact when I asked you the
7 very same question on November 3rd on page
8 142, line two.

9 A Yes.

10 Q "I assume it's also true that a
11 lot of people didn't expect prices to drop
12 significantly in 2000 and 2001. Correct?"
13 You said, "I'm sure that's true." Correct?

14 A **If you can show me -- Yes, there**
15 **it is.**

16 Q I'm sorry. Lines two to five.

17 A **Okay. Yes, that's true.**

18 Q Let me ask you to turn to page 17
19 of your written rebuttal testimony. In the
20 penultimate sentence of the first paragraph
21 under heading 4, you make a statement about
22 the profitability of what you call "the major

Page 217

1 webcasters and simulcasters." Do you see that
 2 right before the confidential material?
 3 A Yes, I do.
 4 Q Now by major webcasters there, you
 5 were referring to AOL, Yahoo, MSN and possibly
 6 Live365. Correct?
 7 A Yes.
 8 Q And by the major simulcasters, you
 9 were referring Clear Channel. Correct?
 10 A Yes.
 11 Q By the way, on page 18 of your
 12 written rebuttal testimony in the second full
 13 paragraph starting with "Clearly..." you refer
 14 in the first sentence to the "current
 15 statutory rate" and in the last sentence to
 16 the "existing rate." What do you understand
 17 the existing rate to be?
 18 A What is the exact value of it? Is
 19 that what you're saying?
 20 Q What do you understand the
 21 existing rate to be to the extent you have an
 22 understanding of it?

Page 218

1 A Seven/100ths of a cent per song
 2 per listener.
 3 Q And that's the rate on which you
 4 based -- That's the understanding on which you
 5 based these statements. I'll withdraw that
 6 question. Continuing on page 18, you speak in
 7 the paragraph marked "Finally" of economic
 8 rents. Do you see that? It actually occurs
 9 in the third line.
 10 A Yes.
 11 Q Just so we're clear, when you
 12 speak of economic rents, you mean the
 13 difference between the revenues generated by
 14 an asset and the cost associated with that
 15 asset. Correct?
 16 A Yes.
 17 Q And in a transaction where the
 18 parties bargain to divide surplus, it's
 19 possible that the surplus accruing to the
 20 sellers could also be economic rent. Correct?
 21 A Yes.
 22 Q Now let's turn to radiolocator.com

Page 219

1 analysis.
 2 CHIEF JUDGE SLEDGE: What's your
 3 estimate of your time?
 4 MR. JOSEPH: I'm sorry?
 5 CHIEF JUDGE SLEDGE: What's your
 6 estimate of time?
 7 MR. JOSEPH: I suspect, Your
 8 Honor, it is more than an hour.
 9 CHIEF JUDGE SLEDGE: We'll recess
 10 for ten minutes. Off the record.
 11 (Whereupon, at 3:38 p.m., the
 12 above-entitled matter recessed and reconvened
 13 at 3:47 p.m. the same day.)
 14 CHIEF JUDGE SLEDGE: On the
 15 record. Mr. Joseph.
 16 MR. JOSEPH: Thank you, Your
 17 Honor.
 18 (Off the record comments.)
 19 MR. JOSEPH: That's I think
 20 Services Rebuttal Exhibit 5.
 21 (Whereupon, the document
 22 referred to was marked

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1 as Services Rebuttal
 2 Exhibit No. 5 for
 3 identification.)
 4 MR. JOSEPH: Dr. Brynjolfsson, as
 5 soon as it's marked and I apologize to the
 6 Court. This clearly could have done and
 7 should have been done on the break which will
 8 cause me to have to ask questions a little
 9 faster. Thank you.
 10 THE WITNESS: Thank you.
 11 CROSS EXAMINATION (Cont'd.)
 12 BY MR. JOSEPH:
 13 Q Dr. Brynjolfsson, I've handed you
 14 what has been marked as Services Rebuttal
 15 Exhibit 5 and I'll just ask -- I'll represent
 16 actually that it was produced as the
 17 production Bates marks indicate at the bottom
 18 by Sound Exchange in connection and I believe
 19 it was identified as having been in connection
 20 with your testimony.
 21 A Yes.
 22 Q Do you recognize this document?

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1 **A It appears to be the analysis that**
2 **the Analysis Group did of simulcasters.**

3 **Q** And this would be the analysis of
4 the research into simulcasters streaming in
5 the top ten markets that are listed in your
6 written rebuttal testimony, wouldn't it be,
7 sir?

8 **A Yes, it appears to be the top ten.**
9 **Yes, that looks about right.**

10 **Q** And it's your understanding, is it
11 not, that this lists the radio stations that
12 are identified as being in particular market?

13 **A Yes, that's my understanding.**

14 **Q** And then the results of the
15 radiocator.com analysis into whether or not
16 they're streaming. Correct?

17 **A Yes, that's correct.**

18 **MR. JOSEPH:** Your Honor, I would
19 offer Services Rebuttal Exhibit 5.

20 **CHIEF JUDGE SLEDGE:** Any
21 objections to Exhibit 5?

22 **MR. SMITH:** No, Your Honor.

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1 **CHIEF JUDGE SLEDGE:** Exhibit 5 is
2 admitted.

3 (The document referred
4 to having been
5 previously marked for
6 identification as
7 Services Rebuttal
8 Exhibit No. 5, was
9 received in evidence.)

10 **BY MR. JOSEPH:**

11 **Q** Now on page 25 of your written
12 rebuttal testimony, you have that table that
13 you discussed with Mr. Smith of the top nine
14 markets and it's correct, is it not, that
15 there are according to the count that the
16 analysis group and your testimony provides 382
17 radio stations stream in the nine largest
18 markets. Is that correct?

19 **A Yes, that's correct as of**
20 **September 2006.**

21 **Q** Do you know how many of those
22 stream in stations are owned by Clear Channel,

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1 Susquehanna or Bonneville?

2 **A No, I don't.**

3 **Q** Now on page 19 of your written
4 rebuttal testimony in the paragraph starting
5 with the "Simulcasters" as opposed to "First
6 Simulcasters" and "Second Simulators."

7 **A Yes. That's the second paragraph.**

8 **Q** Second full paragraph. You say
9 that "radio stations are already" and then you
10 characterize what they're doing in brackets.
11 I don't think that that's --

12 **A Yes.**

13 **Q** "You say already making money
14 streaming." Do you see that?

15 **A Yes.**

16 **Q** Have you done any quantitative
17 analysis of the percentage of all radio
18 simulcasters that are making money from
19 simulcasting?

20 **A I think I saw some data on it at**
21 **one point.**

22 **Q** Do you consider seeing some data

Page 224

1 performing a quantitative analysis, sir?

2 **A I don't know. Do you?**

3 **Q** No. I asked whether you did, sir.

4 **A It's what it is.**

5 **Q** Have you performed any
6 quantitative analysis of the percentage of all
7 radio simulcasters that are making money from
8 simulcasting?

9 **A I saw some data on it. I had -- I**
10 **think at one point I counted it, counted them.**

11 **Q** And that count is not reflected
12 anywhere in your written rebuttal testimony,
13 is it?

14 **A Not specifically, no.**

15 **Q** Do you remember when I asked you
16 whether you had performed a quantitative
17 analysis of the percentage of radio
18 simulcasters that were making money from
19 simulcasting at your deposition on November
20 3rd on page 149?

21 **MR. SMITH:** What line please?

22 **MR. JOSEPH:** Page 5 -- I'm sorry.

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1 Line 5. Page 149, lines 5 through 15.

2 BY MR. JOSEPH:

3 Q I actually asked whether you had
4 done any overall assessment of the percentage
5 and there you said you recalled seeing data.
6 "Yes." And you said you recall seeing
7 anecdotal descriptions entering the market but
8 "I don't recall a quantitative analysis."

9 A Yes.

10 Q Was that statement true when you
11 made it on November 3rd?

12 A Again it's going to depend a
13 little bit on how exactly we define
14 "quantitative analysis" but I would say yes.

15 Q Now on page 26 -- Actually let me
16 not take this. Let me take you to page 33 if
17 I may.

18 A Thirty-three?

19 Q Yes.

20 A Okay.

21 Q And you refer to a number from
22 Sound Exchange down at the bottom of the page.

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1 You refer to a number that you derived from
2 Sound Exchange Exhibit 20RR which I believe we
3 looked at and talked about a little bit
4 earlier. You did it with Mr. Smith. Do you
5 remember that?

6 A Yes.

7 Q Do you know whether the Clear
8 Channel number you quote from that exhibit was
9 actually paid to Clear Channel or represented
10 sales booked as of the date that the document
11 was issued?

12 A Again I would have to look at the
13 document to get the exact definition. Should
14 we do that?

15 Q Yes, if you'd like.

16 A So it's No. 20?

17 Q Yes sir.

18 A Let's see here. So it looks like
19 the gross billing.

20 Q And do you know whether that
21 amount was actually paid to Clear Channel?

22 A Well, my understanding as best I

Page 227

1 know, the gross billing they probably deduct
2 certain expenses and their commission and so
3 presumably some smaller amount would be paid
4 to Clear Channel.

5 Q Okay.

6 A And I don't know what the dates
7 are by which they have to make those payments.

8 Q Now I believe Mr. Smith also asked
9 you about the growth in Clear Channel sales by
10 Ronning Lipset Radio that you discuss at the
11 bottom of page 33.

12 A Yes.

13 Q Do you know when Ronning Lipset
14 Radio began to work with Clear Channel?

15 A No.

16 Q Can you analyze how Ronning Lipset
17 allocates its sales among the companies for
18 which it sells?

19 A Analyze? I'm not sure I would use
20 the word "analyze" but we have the rest of the
21 Exhibit, what is this exhibit, 20 that
22 describes the sales of a lot of other

Page 228

1 companies as well and you could see an
2 allocation from that. Is that what you have
3 in mind?

4 Q No. Actually I was asking if you
5 understand the basis by which RLR allocates
6 sales to its different companies.

7 A Do you mean its clients? Do you
8 mean like Clear Channel?

9 Q Do you have an understanding of
10 the methodology used by RLR to allocate sales
11 among the companies for which it sells such as
12 Clear Channel, Yahoo, AOL?

13 A Such as those companies, no.

14 Q You also mention on page 19 if I'm
15 not mistaken about the page number. Sorry.
16 I am mistaken about the page number. On page
17 26, you mention -- Well, I actually thought
18 you mentioned net radio sales. Do you
19 remember discussing net radio sales in your
20 testimony?

21 A I remember looking at information
22 from them.

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1 Q Well, I think not being able to
2 find it, I'll spare the Court my fumbling and
3 move on. Have you done any quantitative
4 analysis, sir, of the extent to which
5 simulcasters compete with internet only
6 webcasters for the sale of advertising?

7 A The kind of analysis that you'd
8 need to do I'm not sure it would be fair to
9 call it quantitative. So I guess it's hard to
10 call it quantitative.

11 Q So the answer is no.

12 A It's hard to answer yes or no. I
13 would have to say I have an understanding and
14 opinion and about the extent to which they
15 compete based on looking at the markets and
16 the data presented. I personally wouldn't
17 necessarily call it quantitative analysis.

18 Q Do you remember when I asked you
19 exactly that same question on November 3rd?

20 A No, I don't, but I wouldn't be
21 surprised if you did.

22 Q Take a look at page 151, line 17

Page 230

1 through 21.

2 A Okay. Line 17. Okay. Yes.

3 Q And your answer there was a plain
4 straightforward "No." Correct?

5 A Yes, it was.

6 Q Have you done any quantitative
7 analysis of the extent to which simulcasters
8 compete with internet only webcasters for
9 audience?

10 A No, I wouldn't call it
11 quantitative.

12 Q Now on page 27, line 5, or five
13 lines down, they are not numbered lines of
14 course, you say that "listeners who stream go
15 to Clear Channel websites more frequently than
16 those who don't and that those added visits
17 yield significant added revenue through banner
18 ads." Do you see that?

19 A Yes, I do.

20 Q And you refer to an exhibit that
21 in fact is Mr. Parsons' deposition testimony.
22 Correct?

Page 231

1 A Yes.

2 Q Now you don't know how much
3 additional revenue was received by Clear
4 Channel as a result of additional web visits
5 to its websites by people who stream, do you?

6 A I don't know the specific dollar
7 amount, no.

8 Q And isn't it true that in the very
9 same deposition passage which is Exhibit 28RR
10 to which you are referring, Mr. Parsons said
11 that the only traffic, and this is on page 92,
12 lines 19 through 21, that the only traffic
13 increase that the station that is streaming --

14 A Between lines what? Nineteen to
15 21?

16 Q Nineteen to 21.

17 A Yes, here it is.

18 Q Is the repeat traffic from these
19 small number of people that request the
20 stream?

21 A Yes.

22 Q Now in keeping with the issue of

Page 232

1 whether people who stream go to a radio
2 station website more frequently, let's turn
3 back to page 27 or in fact, I think we're at
4 page 27.

5 A Yes.

6 Q Do you see where you say the
7 documents produced by Bonneville demonstrate
8 that listeners who stream also visit
9 Bonneville's websites much more frequently
10 than other visitors and you cite Sound
11 Exchange Trial Exhibit 91.

12 A Yes.

13 Q When some people say "demonstrate"
14 they may be mean prove. Is that what you mean
15 when you say "demonstrate" in this context?

16 A No.

17 Q So you're not taking or saying
18 that Sound Exchange Trial Exhibit 91 proves
19 that listeners who stream visit Bonneville's
20 websites more frequently than other visitors,
21 are you?

22 A No, I'm not.

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1 Q Let's take a look at the document.

2 A **Thank you.**

3 Q Now, Dr. Brynjolfsson, I've
4 actually handed you a document that has been
5 marked as Sound Exchange Trial Exhibit 91 and
6 then there's a second page on the back of it
7 which I'll explain in a second. But I would
8 ask with reference to the first page if this
9 is the document that you used in developing
10 your discussion of the frequency with which
11 people who visit Bonneville's websites who
12 stream compared to the frequency of those who
13 don't stream.

14 A **It appears to be. It's awfully
15 similar, but, yes, it appears to be.**

16 MR. JOSEPH: And actually just for
17 the information of the Court, the second page
18 is simply a photo copy or blowup or the
19 numbers in most of the first page so that it's
20 easier on everyone's eyes and easier to read.

21 THE WITNESS: Right.

22 MR. JOSEPH: And if anyone wants

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1 Q -- eight column number. Yes,
2 after the vertical line down the middle and
3 then Sessions which is three further columns
4 over. Correct?

5 A **Yes.**

6 Q And you when you used this
7 document counted unique visitors as different
8 individuals who visited the website of the
9 radio station during the month. Is that
10 correct?

11 A **That was my interpretation of
12 this.**

13 Q And you challenge --

14 A **There wasn't any particular
15 explanation provided with this document. So
16 that was my best inference of what was going
17 on.**

18 Q And you counted Streaming Cum as
19 the unique streamers during the month.
20 Correct?

21 A **Yes, that's a common definition or
22 at least that's what I thought it was.**

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1 to obviously can look at it and be sure of
2 that, but when me talk about specific numbers
3 going back and forth. But the actual exhibit
4 is the first page. I'm not going to have to
5 move it into evidence because it's already in
6 evidence as a Sound Exchange Trial Exhibit.

7 BY MR. JOSEPH:

8 Q Now, Dr. Brynjolfsson, just so
9 that we can understand what you did in your
10 analysis of the visitors to Bonneville's
11 websites, you looked at four columns on this
12 exhibit. Correct?

13 A **That's my memory, yes.**

14 Q And you looked at unique visits.

15 A **Yes, the first column of numbers.**

16 Q The first column of numbers.
17 Visits (Sessions), the second column of
18 numbers. Right?

19 A **Yes.**

20 Q Streaming Cum which is --

21 A **After that vertical line there
22 (Indicating).**

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1 Q And you counted Sessions over
2 there on the right-hand side as total
3 streaming sessions. Correct?

4 A **Yes. That was the impression
5 because everything on the right seemed to
6 apply to streaming. I thought that probably
7 was what the sessions applied to as well.**

8 Q And let's see. Visit Sessions was
9 the total number of visits to the radio
10 station's website. Correct?

11 A **Yes, that's what I interpreted it
12 as.**

13 Q And as you've said, you weren't
14 exactly sure about what these numbers meant so
15 you made some assumptions. Right?

16 A **Yes, the ones I just described.**

17 Q Okay. Now also I take it you
18 assumed that each streaming session was the
19 result of a separate visit to the website.
20 Correct?

21 A **I don't recall which way. I think
22 I thought of it in different ways, but I think**

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1 **that was probably the most natural way to**
2 **think of it, yes.**

3 Q Well, let's just take a look at
4 what you actually testified. You testified
5 that visitors who streamed visited more than
6 four times more often for an average of 4.82
7 sessions per month.

8 A Yes.

9 Q And to get to that number, you
10 must have assumed that each streaming session
11 was a visit to the website. Correct?

12 A **Actually I think I did. Yes.**

13 Q And to get to that 4.82 number,
14 you divided Streaming Sessions by Streaming
15 Cum. Correct?

16 A **I believe I did, yes.**

17 Q And of course you assumed that the
18 visit to the website for streaming would count
19 as a visit in the Sessions column regardless
20 of whether or not the visitor launched the
21 stream. Correct?

22 A **I think so, yes.**

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1 Q Well, indeed I believe you
2 testified that you understood visits to be the
3 number of times that any person unique or not
4 came to the website. Correct?

5 A **Right.**

6 Q And you said that "the number of
7 streaming sessions," this is at the end of the
8 full paragraph, "constituted an average of
9 more than 80 percent of the total website
10 sessions each month." Right?

11 A Yes.

12 Q And to get to that you divided
13 Visit Sessions by Streaming Sessions. Right?

14 A **I think I did, yes.**

15 Q And similarly it's true that a
16 visitor who streamed and therefore figured
17 into Streaming Cum would count as a unique
18 visitor in the Unique Visitor column of
19 website. Correct?

20 A **Presumably yes.**

21 Q Now again, you say as we've just
22 discussed that visitors who streamed visited

Page 239

1 four times more often than visitors who didn't
2 stream for an average of 4.82 sessions per
3 month and to get that 4.82 number you divided
4 Streaming Cum into Total Streaming Sessions.
5 Correct?

6 A **Yes, I believe I did. I mean**
7 **unfortunately I can't reproduce it right here.**
8 **But I believe I -- I used a spreadsheet.**

9 Q And then you say overall visitors
10 visited Bonneville's website an average of 1.2
11 times a month. Correct? You say that in your
12 testimony.

13 A Yes.

14 Q And to get that number you divided
15 Unique Visits into Total Visits which is Visit
16 Sessions. Right?

17 A Yes.

18 Q Okay. Just to pick one month as
19 an example and we'll go through and see how
20 these numbers work just so we can get an
21 understanding and I think you'll see that it's
22 reasonably representative as we go through.

Page 240

1 I didn't pick it. Rather than sit down and
2 add the numbers and everybody would have it,
3 I just decided to work with KOAT in October.

4 A **Okay.**

5 Q And let me ask you to focus on
6 KOAT in October.

7 A **KOAT in October. That's the sixth**
8 **line up from the bottom.**

9 Q Correct.

10 A **All right.**

11 Q Sixth row up from the bottom.

12 A **Yep.**

13 Q The Unique Sessions -- I'm sorry.
14 Let me rephrase that. The Streaming Sessions
15 was 63,843. Correct?

16 A **It looks like it was, yes. It**
17 **looks like that's an eight there.**

18 Q Okay, and if you're looking at the
19 second page, it's easier. Yes. And the
20 Streaming Cum was 12,510. Right?

21 A Yes.

22 Q And if you do the math, you get

Page 241

1 about 5.1 sessions per streaming person.

2 Correct?

3 **A It seems to be about that, yes.**

4 **Q** Right. And that's pretty close to
5 your average of 4.8. Correct?

6 **A Yes, it is.**

7 **Q** Now let's look at the Total Visits
8 and Unique Visitors. The Total Visits number
9 was 75,951. Correct?

10 **A Yes, that's what it says.**

11 **Q** And the number of Unique Visitors
12 was 68,518. Right?

13 **A Yes.**

14 **Q** And again without making you to do
15 the math in your head, you'll agree that
16 that's roughly 1.19 visits per visitor and
17 that's pretty close to your 1.2 average.
18 Correct?

19 **A It seems about right, yes.**

20 **Q** What I don't get out of this and
21 you may be able to help me with is what your
22 numbers mean for the non-streaming visitors.

Page 242

1 Let's discuss that.

2 **A Yes.**

3 **Q** If you subtract Streaming Cum from
4 the Total Unique Visitors, you get the number
5 of visitors who didn't stream, right, the
6 number of Unique Visitors who didn't stream?

7 **A I suppose that's right, yes.**

8 **Q** Okay. So that would be 68,518
9 minus 12,510. Right?

10 **A Yes.**

11 **Q** And that would give you 56,008
12 Unique Visitors who didn't stream. Correct?

13 **A Yes.**

14 **Q** Now if you subtract the number of
15 streaming sessions from the total number of
16 website visits for sessions you would get the
17 number of visits by visitors who didn't
18 stream. Correct?

19 **A Right.**

20 **Q** And that if I'm not mistaken is
21 75,951 minus 63,843. Right?

22 **A Yes.**

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1 **Q** And that leaves you with 12,108.

2 Correct?

3 **A Yes.**

4 **Q** So as you interpret these numbers,
5 56,008 non-streaming unique visitors visited
6 the website of the station a total of 12,108
7 times for an average of 0.22 times each.
8 Right?

9 **A That doesn't make much sense to
10 me.**

11 **Q** But that's the natural result of
12 the assumptions that you've just described,
13 isn't it?

14 **A It appears to me that you did
15 everything correct.**

16 **Q** You would agree, would you not,
17 that each Unique Visitor has the visit the
18 website at least once to count as a Unique
19 Visitor?

20 **A That would be my expectation, yes.**

21 **Q** And while we're looking at these
22 numbers, Dr. Brynjolfsson, that you presented

Page 244

1 to Court, the way you analyzed these numbers
2 and took the columns to reach your conclusions
3 about 1.2 and 4.8, you wouldn't expect any
4 station in any month to have more streaming
5 sessions than total website visits, would you?

6 **A Streaming sessions than total --
7 No, I wouldn't expect it.**

8 **Q** Well, would you take a look at
9 KDFC in April?

10 **A KDFC in April.**

11 **Q** And you would agree that the
12 number of Streaming Sessions is greater than
13 the number of Total Visit Sessions.

14 **A Yes.**

15 **Q** And if you look at KZBR in June
16 you would see that the number of streaming
17 sessions is more than twice as much as the
18 number of visits.

19 **A KZBR.**

20 **Q** KZBR in June.

21 **A Yes, that's correct.**

22 **Q** So you would agree, would you not,

Page 245

1 that's something fundamentally wrong with your
2 assessment that visitors to Bonneville's
3 websites who stream visited more than four
4 times more often than those who didn't stream
5 based on these data?

6 **A Well, I have to confess that the**
7 **way these things are labeled doesn't appear to**
8 **what they actually are. So I had to go by**
9 **what was provided to me. It may be as you**
10 **conjectured early on that perhaps you could**
11 **have multiple sessions per visit and that**
12 **would account for the difference. You would**
13 **redo it that way. I think that the basic**
14 **point unless Mr. Parsons also made a mistake**
15 **is that people who stream come to the website**
16 **several times more often. These data seem to**
17 **say the same thing but it's going to depend on**
18 **how they define these values. I took them at**
19 **their face value and when you average them it**
20 **came up with a number that's not far from Mr.**
21 **Parsons' number. But I think he did a nice**
22 **analysis of certain numbers here that make me**

Page 246

1 **question whether or not this column that's**
2 **labeled Sessions in fact is actually what it**
3 **seems to be.**

4 **Q Well, Dr. Brynjolfsson, you just**
5 **said these data seem to say the same thing.**

6 **A Yes.**

7 **Q I just want to know on the record**
8 **as an expert economist.**

9 **A Yes.**

10 **Q Are you prepared to rely on these**
11 **numbers in this exhibit to support the**
12 **proposition that these numbers seem to say**
13 **that visitors to Bonneville's website who**
14 **stream visit more often than visitors who**
15 **don't stream?**

16 **A No, I would withdraw that now. I**
17 **think based on that certain of these numbers**
18 **would be interpreted that way don't seem to**
19 **make sense in that way. I think I probably**
20 **would -- My next interpretation would probably**
21 **be that you could have multiple streaming**
22 **sessions per visit and that would probably**

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1 **make sense. I mean I wish that there were**
2 **description of this or I wish I could have**
3 **talked to the people who prepared it. But**
4 **that's frankly what I had to deal with. They**
5 **have these really small items here and I did**
6 **the best I could to understand what they**
7 **meant, but I think in this particular case the**
8 **word "Sessions" didn't exactly mean what I**
9 **thought it meant.**

10 **Q Dr. Brynjolfsson, did you read**
11 **Roger Coryell's testimony?**

12 **A I don't recall. Who is he?**

13 **Q Are you aware that Bonneville**
14 **implemented timeout functions in its San**
15 **Francisco statement so that during the period**
16 **of time that you reviewed in 2005 streaming**
17 **sessions were automatically terminated after**
18 **three hours?**

19 **A No, I wasn't aware of that.**

20 **Q Were you aware that a stream**
21 **listener once he or she is connected to a**
22 **stream can bookmark that stream in the player**

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1 **software so that they can return to the stream**
2 **without going to the website?**

3 **A No, that could account for some of**
4 **the differences. That's very helpful.**

5 **Q Dr. Brynjolfsson, are you aware**
6 **that at least some of Bonneville's San**
7 **Francisco's stations were listed on**
8 **directories that took you to the stream**
9 **without going to the Bonneville's station's**
10 **website?**

11 **A No, I wasn't aware of that.**

12 **Q Now, Dr. Brynjolfsson, on pages 28**
13 **and 29, you report streaming revenue for**
14 **Bonneville stations.**

15 **A Yes.**

16 **Q Let me just ask you whether those**
17 **numbers include revenues from news talk and**
18 **sports stations.**

19 **A I don't know.**

20 **Q You didn't exclude news talk and**
21 **sports stations, did you?**

22 **A I just took the data that was**

1 **reported.**
 2 Q Okay. And on page 30, you report
 3 streaming numbers for Susquehanna stations.
 4 Do those numbers include revenues from news
 5 talk and sports stations?
 6 A **I don't know.**
 7 Q You didn't exclude numbers from
 8 news talk and sports stations. Correct?
 9 A **No, I didn't.**
 10 Q And in your streaming revenue
 11 numbers for Clear Channel, you didn't exclude
 12 news talk and sports stations, did you?
 13 A **No.**
 14 Q Now your Section 2.3(I) about
 15 Bonneville.
 16 A **What page is that?**
 17 Q It starts on page 27.
 18 A **Okay.**
 19 Q And it continues through page 30.
 20 Just a simple question and it's the same
 21 question I asked you at your deposition. You
 22 make a number of statements about revenue and

1 expenses and I just want to be clear and have
 2 the record be clear that those statements are
 3 based entirely on the material that you cite
 4 in your written testimony. Correct?
 5 A **I believe so, yes.**
 6 Q And the same is true with respect
 7 to 2.3(ii) about Susquehanna which appears
 8 starting on page 30.
 9 A **Yes, I believe it is.**
 10 Q And the same is true about
 11 2.3(iii) that starts on page 31 about Clear
 12 Channel.
 13 A **Yes, I believe it is.**
 14 Q And the same is true about your
 15 general statements with respect to
 16 simulcasters appearing before in Section 2.3
 17 before 2.3(I) on pages 26 and 27. Correct?
 18 A **Sorry. About which company was**
 19 **that?**
 20 Q It wasn't any company, sir. It
 21 was the general discussion on page 26.
 22 A **Yes, I believe so. I pretty much**

1 **did my best to cite everything I used.**
 2 Q Let me ask you to please turn to
 3 page 18 of your written rebuttal testimony.
 4 In the paragraph marked "Finally" you discuss
 5 how an appropriate fee metric would accomplish
 6 certain goals. Do you see that particularly
 7 in the last sentence?
 8 A **Yes.**
 9 Q Now it's true, is it not, that the
 10 first goal you identify is that the rates paid
 11 by a given company should take into account
 12 that different companies use different amounts
 13 of music?
 14 A **Let me just see where exactly is**
 15 **that.**
 16 Q It's actually three lines up from
 17 the bottom of the paragraph.
 18 A **Yes. Yes, that's correct.**
 19 Q And it's your testimony, is it
 20 not, that a company who uses more music should
 21 pay more all else equal. Correct?
 22 A **Yes.**

1 Q And similarly it's true that a
 2 company that uses less music should less,
 3 correct, all else equal?
 4 A **Yes, that would follow.**
 5 Q Let me ask you to turn to Part 7
 6 of your testimony where you're discussing
 7 noncommercial stations.
 8 A **Okay. Give me a page number if**
 9 **you can.**
 10 Q Page 40, sir.
 11 A **Okay.**
 12 Q Let me actually first ask you to
 13 turn to page 42 just to try to clear up a
 14 definitional issue.
 15 A **All right. Sure.**
 16 Q When you're discussing the cap in
 17 the middle, see just above paragraph 8.
 18 A **Yes.**
 19 Q You propose a cap for stations
 20 that average for example 20 simultaneous
 21 listeners.
 22 A **Yes.**

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1 Q And then you put in parenthesis,
2 14,400 ATH per month.
3 A Yes.
4 Q Do you see that?
5 A Yes.
6 Q Let me just understand. Twenty
7 simultaneous listeners, is that a concept of
8 the average number of simultaneous listeners
9 that the station streams to?
10 A I think I had in mind a maximum
11 but, you know, honestly it doesn't really
12 matter too much.
13 Q Because you actually said "that
14 average for example." Do you see that?
15 A Yes, I did.
16 Q So you were -- And actually if you
17 talk about 14,400 ATH --
18 A Yes, then I guess it would be an
19 average. Yes.
20 Q That would be an average. Right?
21 Are you familiar by the way with the term
22 "average concurrent listeners"?

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1 A I think I've heard that term.
2 Q Heard it in the same context as
3 "average simultaneous listeners"?
4 A I think so, yes.
5 Q How did you get your 20? Did you
6 take the number of hours in the month and
7 multiply -- How did you get your 14,400? I'm
8 sorry. Did you take the number of hours in
9 the month and divide it by -- in a typical
10 month and multiply it by 20?
11 A I think so. I'd have to -- Is
12 that about right? I think so. Seven hundred.
13 Q Well, 24 times 30 is 720. Right?
14 That's one we can do in our heads.
15 A Yes, right. Okay.
16 Q And 20 times 720 is 14,400.
17 Right?
18 A Yes. Right.
19 Q So essentially to convert from ATH
20 to average simultaneous listeners you divided
21 by the number of hours in a month. Correct?
22 A Hm-hm.

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1 CHIEF JUDGE SLEDGE: Is that a
2 yes?
3 THE WITNESS: Yes. Sorry.
4 BY MR. JOSEPH:
5 Q And that works because ATH
6 actually is a measure of listener hours.
7 Correct?
8 A Yes, aggregate tuning hours.
9 Q Right, and when you divide by the
10 number of hours in a month you're left with a
11 number that has a unit of listeners. Right?
12 A Yes.
13 Q Okay. Dr. Brynjolfsson, that
14 having been cleared up, let me ask you to turn
15 to page 40.
16 A Okay.
17 Q And on pages 40 and 41, you
18 discuss certain noncommercial stations. Do
19 you see that?
20 A Yes, I do.
21 Q Now in each of those bullet
22 points, you it appears discuss either NPR or

Page 256

1 several NPR stations. Correct?
2 A Yes,
3 Q And in fact if you look at the
4 list of stations that you have in there, you
5 have KCRW, KPLU, WKSU, WXPB. They are
6 actually all NPR stations, aren't they?
7 A I think they all are.
8 Q Now you didn't review any
9 financial information from any noncommercial
10 broadcasters or simulcasters other than the
11 NPR stations that you specifically identify in
12 here. Correct?
13 A Not that I recall.
14 Q And you haven't done any analysis
15 of whether these stations that you discuss in
16 your written rebuttal testimony in these
17 bullets are representative of noncommercial
18 stations as a whole, have you?
19 A I didn't necessarily mean for them
20 to be representative of noncommercial
21 stations. I just gave them as examples.
22 Q Now you talked about

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1 cannibalization on -- well, in this section.
2 I'm trying to find exactly. You remember
3 talking about cannibalization. Right?

4 **A Yes, I do.**

5 **Q** Okay. And just to be clear
6 because I believe that Mr. Smith actually made
7 this statement but since what you say is
8 evidence and what he says isn't, you haven't
9 done any quantitative study or analysis of the
10 cannibalization of commercial webcasters'
11 simulcast by noncommercial webcasters or
12 simulcast, have you?

13 **A I've not done a quantitative study**
14 **of that.**

15 **MR. JOSEPH:** May I have a moment
16 or two?

17 **CHIEF JUDGE SLEDGE:** Mr. Joseph,
18 just where is this in his statement?

19 **MR. JOSEPH:** The cannibalization
20 point?

21 **CHIEF JUDGE SLEDGE:** Yes.

22 **MR. JOSEPH:** He was actually

Page 258

1 discussing that earlier. Let me see if I can
2 find it. On page 42 the witness talks about
3 "make sure that doing so interferes with as
4 little as possible with what should be a
5 single market rate" and then "from an economic
6 ..." "this reduces the change that small
7 noncommercial stations will cannibalize the
8 webcasters, the webcasting market more
9 generally." That was what I was referring to
10 and I had trouble finding. Thank you, Your
11 Honor.

12 **CHIEF JUDGE SLEDGE:** I am anxious
13 to see what Mr. Webster says about that word.

14 **MR. JOSEPH:** As I asked, may I
15 have a moment or two, Your Honor, just to be
16 sure I'm done?

17 **CHIEF JUDGE SLEDGE:** Yes sir.
18 (Pause.)

19 **MR. JOSEPH:** Nothing further for
20 now, Your Honor.

21 **CHIEF JUDGE SLEDGE:** Mr. Taylor.

22 **CROSS EXAMINATION (Cont'd.)**

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1 **BY MR. TAYLOR:**

2 **Q** Good afternoon, Dr. Brynjolfsson.

3 **A Good afternoon.**

4 **Q** I apologize. We're once again at
5 the last minute of the day and I'm going to
6 try again to get through my questions as we
7 did on the deposition.

8 **A Does this happen to you with every**
9 **witness?**

10 **Q** Tough acts to follow. Now it
11 would fair to say that you did not do any
12 quantitative analysis when you wrote your
13 statement. Is that correct?

14 **A (Laughter.) No.**

15 **Q** Well, let me -- With respect to my
16 questions, they're going to largely pertain to
17 Section 7, the NonComm Section.

18 **A Okay.**

19 **Q** So when you wrote this part of it,
20 as you've testified earlier, it's fair to say
21 that you didn't do any quantitative analysis
22 with respect to Section 7 regarding

Page 260

1 noncommercial stations.

2 **A Well, I think that the**
3 **quantitative analysis that I did elsewhere in**
4 **the report generally applies without any**
5 **significant modification in Section 7 as it**
6 **does elsewhere.**

7 **Q** But with respect to the specific
8 statements that you make in Section 7, you did
9 not do any quantitative analysis to support
10 those statements.

11 **A Do you have a particular statement**
12 **in mind?**

13 **Q** Sure. How about let's start with
14 "Many noncommercial stations increasingly
15 resemble commercial stations."

16 **JUDGE ROBERTS:** Where is that?

17 **MR. TAYLOR:** I'm sorry. That is
18 in the second paragraph.

19 **THE WITNESS:** Right. So I support
20 that with the, what is that, five specific
21 bullet points after that. That's the analysis
22 that I provided for that.

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1 BY MR. TAYLOR:

2 Q But you didn't do any quantitative
3 analysis comparing any of the noncommercial
4 stations to each other, did you?

5 A You know, I have to confess that
6 this use of the word "quantitative analysis,"
7 I mean there's numbers there. I've analyzed
8 it. You don't know whether you want to call
9 that a quantitative analysis. I feel maybe
10 uncomfortable with that. Is there some kind
11 of a special meaning to this? But we looked
12 at the number of listeners there, for
13 instance, in the first bullet point, etc. I
14 don't know whether you want to call that a
15 quantitative analysis, but that's what it is.

16 Q Did you compile a list of
17 noncommercial stations?

18 A Comply a list? Not an exhaustive
19 list certainly.

20 Q Did you comply any list of
21 noncommercial stations?

22 A Yes, there's a list right here in

Page 262

1 here. There's a list of several of them.

2 Q And you -- And did you consider
3 the revenues other than these that you have
4 here? Did you comply a list of any other
5 noncommercial stations?

6 A You know my team, we did look at a
7 bunch of stations. I don't think we included
8 every single thing that we looked at in the
9 report. This is meant to be just some
10 examples.

11 Q So are you saying that you have
12 documents that reflect the fact that you have
13 other lists?

14 A I don't recall. I recall visiting
15 a lot of the websites and looking at
16 financials. In general these, NPR and other
17 stations, they just report the stuff right on
18 the website. Anyone can read it. I remember
19 looking through various documents and I've
20 reproduced that ones that I needed to report -

21 -
22 Q Going back to my question, do you

Page 263

1 have any other lists with respect to
2 noncommercial stations?

3 A Do I have any -- No, not that I
4 can think of.

5 Q Okay. Do you consider what you
6 did to support your statement here or the work
7 that you did with respect to your statement
8 here, do you consider that to be a
9 comprehensive study of noncommercial stations?

10 A The work that I did to support
11 this analysis mostly is reflected in the rest
12 of the report. It's not meant to be self
13 contained as a separate analysis. So I would
14 say that overall analysis is comprehensive,
15 yes.

16 Q But let's be specific to Section
17 7.

18 A All right.

19 Q Did you do a comprehensive study
20 of noncommercial stations when you made your
21 statement that "many noncommercial stations
22 increasingly resemble commercial stations"?

Page 264

1 A I did the study that I reported
2 here. I call that maybe moderately
3 comprehensive.

4 Q Okay. So can you tell me how many
5 noncommercial stations the FCC has licensed?

6 A No, I don't know how many.

7 Q Could you tell me then how many
8 noncommercial stations are affiliated with
9 NPR?

10 A No, I don't know how many.

11 Q How about Collegiate Radio
12 Broadcasters? Can you tell how many
13 noncommercial stations there are for the
14 Collegiate Radio Broadcasters?

15 A No.

16 Q How about -- Can you tell us how
17 many NPR stations are online?

18 A I don't know the exact number, no.

19 Q Do you know a rough number?

20 A Pretty much all the ones that I
21 looked at were online.

22 Q Do you think -- And how many would

Page 265

1 that be that you looked at?

2 **A Maybe a dozen or so.**

3 **Q** So is it your testimony here

4 sitting today that there are only a dozen NPR

5 stations online?

6 **A No, it's my testimony that**

7 **everyone that I looked at was online. But I**

8 **don't claim that that was a representative**

9 **sampling.**

10 **Q** But you can't tell us exactly how

11 NPR stations are online.

12 **A That's correct.**

13 **Q** And can you tell us how many of

14 these NPR stations may be streaming music?

15 **A I don't know that exact number,**

16 **no.**

17 **Q** Do you know a rough number?

18 **A No, I don't really know.**

19 **Q** Do you know how many of these

20 stations would be simulcasting?

21 **A I know at least the ones I visited**

22 **were, but that's really all I can say with**

Page 266

1 **certainty.**

2 **Q** So in your statement on page 40.

3 **A Yes.**

4 **Q** When you say, "Many NPR stations

5 simulcast a significant amount of music" you

6 can't quantify that amount, can you?

7 **A Which bullet was that?**

8 **Q** I think it's the second bullet,

9 the second sentence for example. "Many NPR

10 stations simulcast a significant amount of

11 music."

12 **A Yes. Well, many do. Yes, I --**

13 **Q** Can you quantify that amount for

14 us?

15 **A I can't put an specific number on**

16 **it, no.**

17 **Q** Now going up to the top bullet

18 there on page 40 and without saying the

19 number, you provide the aggregate tuning hours

20 for a station. Do you see that number?

21 **A Yes, I do shaded out. Yes.**

22 **Q** Yes. Now can you tell what

Page 267

1 station that is for?

2 **A I need to double-check the exhibit**

3 **here. I'm not sure. I think it may be KPLU,**

4 **but I'm not sure.**

5 **Q** Now you say "Some noncommercial

6 stations have large streaming office."

7 **A "Audiences."**

8 **Q** "Audiences," excuse me.

9 **A Yes.**

10 **Q** When you say "some" exactly how

11 many stations would that be?

12 **A I don't have an exact number.**

13 **Q** In that paragraph that's

14 discussing the large audiences.

15 **A Yes.**

16 **Q** I think you cite KPLU as an NPR

17 station that boasts 500,000 listeners per

18 month.

19 **A Yes.**

20 **Q** So KPLU is an example of a large

21 streaming audience?

22 **A Yes.**

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1 **Q** Is that your testimony?

2 **A Yes.**

3 **Q** That's an example?

4 **A Yes.**

5 **Q** Is KPLU's online audience size

6 representative of audience sizes for other NPR

7 stations?

8 **A I suspect it's larger than most.**

9 **Q** So is it in fact atypical?

10 **A I suspect it is, yes.**

11 **Q** Do you know what the average

12 audience size is for NPR member stations?

13 **A No, I don't.**

14 **Q** Turning to, let's see, in your

15 testimony on page 41, you state "NPR is

16 developing a digital music distribution

17 portal."

18 **A Yes.**

19 **Q** And I think I'll also refer you to

20 Exhibit 212 which you --

21 **A Right.**

22 **Q** -- cite to support that.

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1 A Yes.

2 Q Did you verify the accuracy of the
3 press release?

4 A No.

5 Q So do you know sitting here today
6 that NPR is still engaged or about to launch
7 a music website portal?

8 A No, that's what they said they
9 were doing.

10 Q But sitting here today, do you
11 know whether or not NPR is still planning to
12 launch a music portal?

13 A No, I don't know if they're still
14 planning to do that.

15 Q Later in your testimony, I think
16 it's the second paragraph, you state that NPR
17 has \$400 million in assets. Is that correct?

18 A Yes.

19 Q Isn't it true that almost half of
20 that amount is permanently restricted?

21 A It may be.

22 Q What is your understanding -- when

Page 270

1 I say "permanently restricted" what
2 understanding do you have?

3 A I remember looking at the balance
4 sheet and the income statement. I think I may
5 even listed it here and it did list different
6 kinds of columns of different types of assets,
7 short term, long term, restricted, so forth.

8 Q But for the benefit of the record,
9 does permanently restricted have any specific
10 meaning to you?

11 A You know, no. For the purposes of
12 this, I mean whether it's \$200 million or \$400
13 million that's not really my point.

14 Q Okay. But why don't you turn to
15 page 5 of that exhibit?

16 A Yes. Okay. Which one is that? SX
17 213

18 Q 213.

19 A Okay.

20 Q And if you look under No. 2,
21 Classification of Net Assets.

22 A Yes.

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1 Q You see "permanently restricted."

2 A Yes.

3 Q Do you want to refresh?

4 A Okay. Got it.

5 Q So those are contributions and
6 other inflows of assets whose use is limited
7 by donor imposed stipulations.

8 A Right. I think I read about that
9 in the news at one point. Yes.

10 Q Okay. So those -- So it's your
11 understanding that that \$200 million is freely
12 available for NPR's use.

13 A Well, apparently the income may be
14 used, yes.

15 Q But the \$200 -- The principal, is
16 the principal available?

17 A Yes. Apparently, they preserved
18 the principal -- I mean I know a lot of
19 organizations, I know MIT, sadly doesn't spend
20 its principal. They only spend the interest
21 on that for faculty salaries and whatnot and
22 it appears to be a similar policy at NPR,

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1 legal fees and whatnot.

2 Q And you mentioned the news. Were
3 you also aware that almost \$2 million was
4 donated by an individual who is "a news
5 junkie" and in support of NPR's educational
6 mission? Were you aware of that?

7 A No, I'm not a news junkie.

8 Q Sorry?

9 A I guess I'm not a news junkie.

10 Q Now in that same paragraph you
11 discuss WAMU.

12 A Yes.

13 Q Do you know what market WAMU
14 serves?

15 A I think American University. Yes,
16 I think it's probably around here. Right?
17 Washington.

18 Q And is it that -- Can I take that
19 you've educated yourself since our deposition?

20 A You know, I actually heard it in
21 the taxicab at some point here. So that
22 helped.

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1 Q That's fair enough. You note here
2 that the station has \$590,000 in excess from
3 its expenditure revenues to expenditures.

4 A Yes, \$480,000 -- \$5,000 right.
5 Isn't that what?

6 Q No. I think --

7 A Oh no. That's XPN. Yes, MU,
8 sorry. Where exactly you want me to --

9 Q I just said you note that --

10 A Oh yeah. For AMU, it's \$590,000.
11 Right. Sorry. Yes.

12 Q And isn't it true that in previous
13 years the station had run a sufficient loss?

14 A A sufficient loss? It's possible.
15 I'm not sure what you mean, but it's possible
16 it had a loss. Yes.

17 Q Well, I mean if it had a loss -- I
18 mean if you turn to page 4.

19 A Of what?

20 Q Of Exhibit 202.

21 A 202, yes.

22 Q And you look down under the 2004

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1 column, cash at the beginning of the year.

2 A Yes.

3 Q It has nothing there. So isn't it
4 true that those losses, that the lack of cash
5 on hand, reflects the fact that they did in
6 fact run losses for the previous years?

7 A Not necessarily, but it may well
8 be, yes.

9 Q Okay.

10 A It's not really -- I don't see
11 that it would be relevant.

12 Q And isn't it also true that WAMU
13 although its position improved the university
14 had to forgive almost \$1.4 million later that
15 year for fees that it had assessed the
16 station?

17 A I think I did see something to
18 that effect in here somewhere. But I think I
19 saw something about university in-kind
20 donation or something. Was there a reference
21 to that?

22 Q I think the exact reference is on

Page 275

1 page 6.

2 A Right.

3 Q And it says "For the year ended
4 April 30, 2004 the university agreed to ..."

5 A -- services stuff, yeah.

6 Q "The university agreed to waive
7 the charges..."

8 A Right.

9 Q "...to WAMU for the cost of the
10 indirect services."

11 A Yes, exactly.

12 Q "In the amount of \$1.378 million."

13 A Yes, I remember that.

14 Q And I think you may have already
15 answered this but just to make sure we have
16 everything covered here, isn't it true that
17 you have not conducted any studies relating to
18 your theory that cannibalization is occurring
19 in the webcast market between noncommercial
20 broadcasters and the commercial market?

21 A Well, my study is very, very
22 brief. I can do it all for you right here

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1 which is that they have they're selling an
2 identical digital good and I know --

3 Q Dr. Brynjolfsson, isn't it true
4 that you have not conducted any study?

5 MR. SMITH: Objection. Your
6 Honor, he interrupted him in the middle of his
7 answer.

8 CHIEF JUDGE SLEDGE: Overruled.
9 BY MR. TAYLOR:

10 Q Yes or no?

11 A I have done a study, yes.

12 Q Okay. Dr. Brynjolfsson, I'm going
13 to read part of your deposition back to you.
14 "Have you conducted any studies relating to
15 your theory that cannibalization occurred in
16 the web" --

17 A What page please?

18 MR. SMITH: Line and page number
19 before you read it.

20 MR. TAYLOR: On 198.

21 MR. SMITH: What line?

22 MR. SMITH: Line 21.

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1 BY MR. TAYLOR:

2 Q "Have you conducted any studies
3 relating to your" --

4 A **Wait a minute. I don't see that**
5 **on page 198 line 21.**

6 Q Are you looking at Services
7 Rebuttal Exhibit 3?

8 A **So this is the other document?**

9 Q This is the official document.

10 A **The initial one? The one with the**
11 **really small print. Okay. 198, the other**
12 **198. Okay. Sorry. What line?**

13 Q "Have you conducted any studies
14 relating to your theory that cannibalization
15 occurs in the webcasting market between
16 noncommercial broadcasters and the commercial
17 market?"

18 A **I'm sorry. What line is that?**

19 Q I'm sorry. I'm having so much fun
20 reading this. Line 21.

21 CHIEF JUDGE SLEDGE: There isn't
22 any such testimony on line 21, page 198.

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1 THE WITNESS: If you're looking at
2 the page numbers at the bottom of the page.
3 Right?

4 (Off the record discussion.)

5 BY MR. TAYLOR:

6 Q So have you found it, Dr.
7 Brynjolfsson? It is in fact in mid sentence.

8 A **Okay. I see. It's the question**
9 **starting on line 20. Right?**

10 Q Yes. Twenty-one is where the
11 question begins, but 20 yes.

12 A **Twenty is where the Q is. Okay.**
13 **In the middle of Line 21, "Have you have**
14 **conducted any studies," yes, etc.**

15 Q And so and you said, "I haven't
16 done any quan studies no. Was that your
17 statement, sir?"

18 A **Yes, I think that was my**
19 **statement, yes.**

20 MR. TAYLOR: Nothing further.

21 THE WITNESS: Just I think it's
22 worth reading the rest of it where I clarify

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1 that since I would if I had time here but --

2 CHIEF JUDGE SLEDGE: All right.

3 Mr. Smith, any further questions?

4 PARTICIPANT: Your Honor?

5 CHIEF JUDGE SLEDGE: Yes.

6 PARTICIPANT: We have another
7 participant here.

8 MR. DUMAS-EYMARD: Your Honor
9 (Inaudible.)

10 CHIEF JUDGE SLEDGE: Can't hear
11 you. You have to come up to the podium.

12 MR. DUMAS-EYMARD: I am Rick
13 Dumas-Eymard. I'm here representing
14 Collegiate Broadcasters Inc. and I wonder if
15 I could have five minutes of the Court to ask
16 a few questions of the witness.

17 CHIEF JUDGE SLEDGE: Have you
18 filed an appearance in this proceeding?

19 MR. DUMAS-EYMARD: Yes, I have,
20 Your Honor.

21 CHIEF JUDGE SLEDGE: When and how?

22 MR. DUMAS-EYMARD: It was filed by

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1 our paralegal this past week. I have a copy
2 of my appearance here.

3 CHIEF JUDGE SLEDGE: Let me see
4 that.

5 (Judge proffers document.)

6 CHIEF JUDGE SLEDGE: And you
7 represent this has been filed.

8 MR. DUMAS-EYMARD: This is filed
9 this past week, Your Honor.

10 CHIEF JUDGE SLEDGE: All right.

11 Please proceed. Can we have your name again,
12 sir?

13 MR. DUMAS-EYMARD: Yes, my name is
14 Rick Dumas Eymard.

15 CROSS EXAMINATION (Cont'd.)

16 BY MR. DUMAS-EYMARD:

17 Q Good afternoon, Professor Dumas-
18 Eymard.

19 A **Good afternoon.**

20 Q You'll be relieved that I'll not
21 be keeping you very long here. Professor
22 Brynjolfsson, do you recall stating that many

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1 noncommercial stations increasingly resemble
2 commercial stations?

3 **A Yes, I do.**

4 **Q** According to your written
5 testimony?

6 **A Yes, I do.**

7 **Q** In making that statement, were you
8 referring in particular to Collegiate
9 Broadcasters?

10 **A Not in particular to Collegiate**
11 **Broadcasters, no.**

12 **Q** Did you consider Collegiate
13 Broadcasters in making that conclusion?

14 **A Yes, I did.**

15 **Q** Could you tell me? You list five
16 ways in which noncommercial broadcasters or
17 webcasters increasingly resemble commercial
18 webcasters. Could you indicate in particular
19 whether your point that some noncommercial
20 stations have very large streaming audiences
21 applies to Collegiate Broadcasters?

22 **A Sure. I believe WHRB is a**

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1 collegiate broadcaster from Harvard radio
2 broadcasting. I listen to them from time to
3 time. I believe, point no. 1, they have a
4 large streaming audience. They have a
5 worldwide streaming audience and they compete
6 with, point no. 2, they simulcast significant
7 amounts of music and so I think point no. 3,
8 they sell underwriting a sponsor. Actually,
9 I recently visited WHRB. They're a little
10 more blunt. I believe they actually have a
11 button that says "Advertise Here." So it's
12 not just underwriting sponsorships. It's
13 really advertising directly. In that sense,
14 it's directly the same. Point No. 4, side
15 channels, I think I saw at WBUR that they have
16 a side channel. I can't remember for sure.
17 That's Boston University radio. Maybe HRB
18 does too. I can't remember for sure.

19 **And enormous resources and I'm not**
20 **sure what the distinction you should make.**
21 **WBUR, I believe that's Boston University, but**
22 **I also think it's a NPR station. So some of**

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1 **the comments I make about resources of NPR**
2 **stations would also apply to certain**
3 **collegiate stations. So it looks like if you**
4 **go through them all, the bullets, I guess all**
5 **of them apply to some extent.**

6 **Q** Do you remember stating, Professor
7 Brynjolfsson, that recent industry entry
8 activity especially by simulcasters
9 corroborates that the existing rate is not too
10 high?

11 **A Yes, I do remember saying that.**

12 **Q** When you made that statement, were
13 you considering educational stations?

14 **A Not specifically. My economic**
15 **model really is meant to apply to any kind of**
16 **a station insofar as they have similar**
17 **products that they're selling and similar**
18 **revenue sources and similar costs. I think my**
19 **analysis would apply regardless of the**
20 **particular type of station.**

21 **Q** But you are not aware of specific
22 examples of collegiate simulcasters entering

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1 the market recently?

2 **A I didn't make that distinction**
3 **when I was doing the analysis and I don't**
4 **think any of my analyses would vary based on**
5 **that distinction.**

6 **Q** Do you also recall stating that
7 webcasters and simulcasters will enjoy a large
8 windfall in the economic grants they receive
9 if a current rate is not appropriately
10 increased?

11 **A Yes, I do.**

12 **Q** Were you considering educational
13 broadcasters when you made that statement?

14 **A Not specifically, but I believe**
15 **they are subject to the same economics,**
16 **largely the same economics, as other type of**
17 **internet webcasters.**

18 **Q** But you did not make any specific
19 research or analysis of that point before
20 reaching this conclusion.

21 **A I didn't do a separate analysis**
22 **for them. No, I did not.**

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1 **MR. DUMAS-EYMARD:** Thank you, Your
 2 **Honor. I have nothing further.**
 3 **CHIEF JUDGE SLEDGE:** Mr. Smith?
 4 **MR. SMITH:** I just have one thing
 5 I wanted to clarify, Your Honor.
 6 **REDIRECT EXAMINATION**
 7 **BY MR. SMITH:**
 8 **Q** Professor, Mr. Sugarman ended his
 9 examination of you by asking about your
 10 discussion on page 43 of the flexible rate
 11 structure where you would have per performance
 12 floor and an upside of revenue sharing on a
 13 percentage basis.
 14 **A** Yes.
 15 **Q** Do you recall that?
 16 **A** Yes, I do.
 17 **Q** And can you tell us why you think
 18 that proposal offers improved risk sharing
 19 compared to having just one of those
 20 components?
 21 **A** Sure. If you were to say only
 22 have the revenue share, then there would be a

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1 significant risk born by the owners of the
 2 sound recordings, the record labels, that a
 3 company could find a way to monetize the value
 4 of those sound recordings in a way that wasn't
 5 recorded and didn't accrue to the record
 6 labels. For instance, they could achieve some
 7 sort of spillover benefits or for that matter
 8 they could just have high managerial salaries
 9 or inefficiently run. So there would be a
 10 real risk that a company would report zero
 11 accounting profits yet still be benefitting
 12 other way. So having a floor helps prevent
 13 that and mitigate the risk of that happening.
 14 Similarly, by having the rate
 15 adjustable what we did was we actually lowered
 16 the per play rate that would be charged to the
 17 webcasters and instead had it be in part a
 18 function of the overall revenues that they
 19 earned. That way if the webcasters earned
 20 somewhat less than my projections were, they
 21 would not have to pay as much down to that
 22 floor.

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1 **On the other hand, if they earned**
 2 **more, the record labels would benefit. So**
 3 **they would basically share some of the**
 4 **downside and some of the upside, not all of**
 5 **the downside and not all of the upside but**
 6 **some of it. So in that sense, it's improved**
 7 **risk sharing.**
 8 **MR. SMITH:** Thank you.
 9 **CHIEF JUDGE SLEDGE:** Mr. Sugarman?
 10 **MR. SUGARMAN:** I don't have
 11 anything further, Your Honor.
 12 **CHIEF JUDGE SLEDGE:** Mr. Joseph?
 13 **MR. JOSEPH:** Nothing further, Your
 14 Honor.
 15 **CHIEF JUDGE SLEDGE:** Mr. Taylor?
 16 **MR. TAYLOR:** Very briefly, Your
 17 Honor.
 18 **RECROSS EXAMINATION**
 19 **BY MR. TAYLOR:**
 20 **Q** Dr. Brynjolfsson, in responding to
 21 your statements concerning the advertising
 22 button for college broadcasters and the

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1 economics of noncommercial broadcasting being
 2 similar to commercial broadcasters and you did
 3 not consider that part of that distinction in
 4 your model --
 5 **CHIEF JUDGE SLEDGE:** Mr. Smith.
 6 **MR. SMITH:** I'm going to object to
 7 the question. It's outside the scope of the
 8 redirect.
 9 **CHIEF JUDGE SLEDGE:** What
 10 questions are you referring to when you're
 11 asking those questions?
 12 **MR. TAYLOR:** He made a clear
 13 statement under examination by CBI that that
 14 his analysis was applicable to noncommercial
 15 broadcasters because he did not draw a
 16 distinction between the two of them and I just
 17 wanted to test that statement.
 18 **CHIEF JUDGE SLEDGE:** Objection
 19 sustained.
 20 **MR. TAYLOR:** I have nothing
 21 further.
 22 **CHIEF JUDGE SLEDGE:** Mr. Dumas-

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1 Eymard?

2 MR. DUMAS-EYMARD: Nothing.

3 CHIEF JUDGE SLEDGE: Any questions
4 from the bench?

5 JUDGE WISNIEWSKI: Yes. Just one
6 question since we're on the subject of page
7 42, Mr. Brynjolfsson.

8 THE WITNESS: Yes.

9 JUDGE WISNIEWSKI: You start
10 talking about at the top of that first full
11 paragraph that if we elect to set a separate
12 royalty rate for very small noncommercial
13 stations streaming for non-economic reasons
14 and then you go on to talk about making sure
15 that doesn't impact the commercial rates
16 apparently based on the economic reasons.

17 THE WITNESS: Yes.

18 JUDGE WISNIEWSKI: What non-
19 economic reasons did you have in mind here?

20 THE WITNESS: It is possible that
21 for some public policy reasons you'd want to
22 subsidize small collegiate broadcasters and

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1 rather than do that through general revenues
2 ask the owners of sound recording copyrights
3 to provide their services at a discounted
4 amount to those people.

5 JUDGE WISNIEWSKI: What kind of
6 public policy reasons? Could you give me an
7 example?

8 THE WITNESS: Sure. We do lots of
9 things to try to encourage and support college
10 education and maybe encourage small businesses
11 and a variety. There are political reasons
12 and social reasons you might want to do that.
13 It would not be something -- If you literally
14 followed the willing buyer/willing seller
15 standard, I don't think it's something that a
16 willing seller would willingly do. But I
17 could imagine that there may be other reasons,
18 non-economic reasons you would want to do that
19 and then I think it could be done as I
20 prescribe here in a way that wouldn't be
21 particularly harmful to the sellers or to that
22 matter to the other commercial broadcasters or

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1 simulcasters.

2 JUDGE WISNIEWSKI: Well, maybe you
3 can help me out here. That's where I'm having
4 a little bit of trouble making a distinction.

5 THE WITNESS: Yes.

6 JUDGE WISNIEWSKI: In terms of the
7 example that you gave that society might
8 benefit from the educational value of this.

9 THE WITNESS: Yes.

10 JUDGE WISNIEWSKI: If society has
11 such a benefit, wouldn't that be part of the
12 welfare calculation there and therefore an
13 economic analysis?

14 THE WITNESS: Not as I understand
15 it. I mean maybe I might have -- didn't read
16 the rules carefully enough but I was basically
17 applying what a willing buyer and willing
18 seller would agree to and so that was the
19 analysis that I was applying.

20 JUDGE WISNIEWSKI: Thank you. So
21 when you say "non-economic analysis" you're
22 referring to nonapplicable standard analysis.

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1 Is that what we should interpret that
2 sentence?

3 THE WITNESS: Actually a good
4 point. You're right. An economist, you're
5 right. That is a good clarification. You're
6 right. An economist might say that we have
7 welfare reasons and there's economic benefits.
8 So that would be a better way of phrasing it.
9 I meant that the economic analysis that I did
10 in terms of the willing buyer/willing seller
11 standard.

12 JUDGE WISNIEWSKI: Thank you.

13 THE WITNESS: Sure.

14 JUDGE ROBERTS: Picking up on that
15 same point, why wouldn't a seller take into
16 consideration the special circumstances of say
17 a collegiate broadcaster? Can't there be some
18 reasons that they might (Inaudible.) mentioned
19 on a policy side political reasons. Couldn't
20 that be part of a willing buyer/willing seller
21 dynamic?

22 THE WITNESS: Yes. Certainly one

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1 could imagine that the seller was motivated
 2 for something other than a profit motive and
 3 liked a particular political point of view or
 4 liked a particular group of people or ethnic
 5 group or whatever and might decide to provide
 6 special terms to them with the bounds of the
 7 law. So I didn't include that type of
 8 reasoning. It's conceivable that a willing
 9 seller would do that sort of thing.

10 In this case, my analysis would be
 11 that because the goods are digital identical
 12 goods that it's much more costly, much more
 13 harmful, because of the threat of
 14 substitution. In many cases, you could give
 15 away something to one group and it wouldn't
 16 hurt your other markets. In this case, if you
 17 were to give a reduced rate to one group, my
 18 judgment it would be a high risk that your
 19 other markets would be directly affected. So
 20 they would have to have a strong perhaps
 21 nonfinancial motive for doing that and I
 22 didn't include any such type of motive in my

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1 analysis.

2 JUDGE ROBERTS: Does it
 3 necessarily have to be a nonfinancial motive?
 4 Couldn't it be a situation of a willing seller
 5 saying "If I don't adjust my price for this
 6 particular group, I might run the decided risk
 7 of legislation, litigation. These kind of
 8 things could seriously affect my profits and
 9 therefore for an economic reason I'm going to
 10 adjust the rate"?

11 THE WITNESS: Yes, I think that's
 12 possible. I mean it's sort of a gray area
 13 there in terms of it wouldn't be directly
 14 something they would do to maximize profits
 15 but something that they would do in order to
 16 enhance their public image or as you say,
 17 avoid litigation. That could certainly be
 18 possible.

19 JUDGE ROBERTS: And I also had a
 20 question about the anti-cannibalization cap.

21 THE WITNESS: Yes.

22 JUDGE ROBERTS: I'm going to have

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1 to explain that to my wife tonight when I go
 2 home. This is what we were talking about.
 3 You give out a for-example what the cap could
 4 be.

5 THE WITNESS: Yes.

6 JUDGE ROBERTS: But do you have
 7 any particular basis or foundation for what a
 8 cap really should be? I mean just throwing
 9 out a 20 simultaneous listeners by way of
 10 example I'm not seeing any particular support
 11 for that other than this could be one of the
 12 myriad of ways you might do it.

13 THE WITNESS: Yes, there isn't a
 14 strong economic analysis for this because
 15 essentially if you were to do just literally
 16 basic on the economics of it I think that
 17 wouldn't do it all. The cap would be zero.
 18 So my sense is that you could put a cap of 20
 19 without doing a whole lot, having a whole lot
 20 of financial costs to them and that number
 21 looking at the testimony of Mr. Robedee would
 22 be enough apparently to cover a lot of the

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1 small noncommercial ones.

2 So it seemed to be something that
 3 in my mind struck a balance between on one
 4 hand not doing any really significant
 5 financial damage to the other webcasters or
 6 the record labels, yet still covering a large
 7 number of these smaller noncommercial
 8 stations. But there's no -- I could easily
 9 see that number being 30 or I could see it
 10 being 15. I don't think that -- I wouldn't be
 11 wedded to the exact number 20. But that's the
 12 balance that I was trying to strike.

13 JUDGE ROBERTS: Thank you.

14 CHIEF JUDGE SLEDGE: Any questions
 15 as a result of those from the bench?

16 MR. SUGARMAN: No Your Honor.

17 MR. SMITH: No Your Honor.

18 CHIEF JUDGE SLEDGE: Thank you,
 19 sir. That completes your testimony.

20 THE WITNESS: Thank you.
 21 (Witness excused.)

22 CHIEF JUDGE SLEDGE: Mr. Smith, we

1 continue with Mr. Griffin tomorrow.

2 MR. SMITH: We do, Your Honor.

3 CHIEF JUDGE SLEDGE: And you
4 expect him to take all day.

5 MR. SMITH: I believe it will take
6 a large percentage of the day. I don't know
7 if it will go as long as this, but hopefully
8 not.

9 CHIEF JUDGE SLEDGE: No one else
10 is available to fill in tomorrow?

11 MR. SMITH: No Your Honor. I
12 think most people were hoping we might leave
13 a little earlier than 5:00 p.m. tomorrow.

14 CHIEF JUDGE SLEDGE: We adjourn
15 until 9:30 a.m. tomorrow. Off the record.

16 (Whereupon, at 5:09 p.m., the
17 above-entitled matter was concluded.)
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19
20
21
22

A				
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Transcript of:

Date: November 21, 2006

Volume: 42

Case: Digital Performance Rights

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